# (17,474.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1899.

No. 360.

CHARLES F. CHAMPION, APPELLANT,

*vs.*

JOHN C. AMES, UNITED STATES MARSHAL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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a United States Circuit Court, Northern District of Illinois, Northern Division.

In the Matter of the Petition of CHARLES F. CHAMPION for a Writ of *Habeas Corpus*. 25236.

Joseph B. David and Moritz Rosenthal, attorneys for Charles F. Champion.

S. H. Bethea, United States attorney for the northern district of Illinois, for John C. Ames, United States marshal.

1 Pleas in the circuit court of the United States for the northern district of Illinois, northern division, begun and held at the United States court-room, in the city of Chicago, in said district and division, before the Honorable James G. Jenkins, circuit judge of the United States for the seventh judicial circuit, on Tuesday, the twenty-seventh day of June, in the year of our Lord one thousand eight hundred and ninety-nine, being one of the regular days of the December term of said court, 1898, and of our Independence the one hundred and twenty-third year.

S. W. BURNHAM, *Clerk*.

In the Matter of the Petition of CHARLES F. CHAMPION for a Writ of *Habeas Corpus*. 25236.

Be it remembered that on this day, to wit, the twenty-second day of June, in the year of our Lord one thousand eight hundred and ninety-nine, came Charles F. Champion, by his attorney, and filed in the clerk's office of said court a certain petition for writ of *habeas corpus*, and also for a writ of certiorari; which said petition is in the words and figures following, to wit:

2 UNITED STATES OF AMERICA, } ss:
*State of Illinois*, }

In the Circuit Court of the United States of America, Northern District of Illinois, Northern Division.

In the Matter of the Petition of CHARLES F. CHAMPION for Writ of *Habeas Corpus*.

To the Honorable Christian C. Kohlsaat, one of the judges of said court:

The petitioner, Charles F. Champion, a resident and citizen of the city of Chicago, Cook county and State of Illinois, respectfully shows to your honor that on the 28th day of February, A. D. 1899, one L. H. Farrish made complaint in writing before Charles H. Ledman, Esquire, a United States commissioner for the northern district of Texas, at Dallas, Texas, charging that your petitioner and one W. F. Champion and one C. B. Park did unlawfully conspire and agree together, in violation of section 5440 of the Revised Statutes of the

United States, to commit an offence against the United States, to wit, did, for the purpose of disposing of the same, transport and cause to be transported and did deposit for the purpose of being transported, at Dallas, in the State of Texas, to Fresno, in the State of California, one certain box and package of lottery tickets, advertisements, certificates, papers, and documents representing a ticket for a chance share and interest in and dependent upon the event of a certain lottery, called the Pan-American Lottery Company, at Paraguay, South America; that upon the filing of such complaint before said commissioner a warrant for apprehension and arrest of the parties therein named was issued by said commissioner; that upon the 3rd day of March, A. D. 1899, a certified copy of said complaint and said warrant was filed with Lewis F. Mason,
3 Esquire, a United States commissioner in and for the northern district of Illinois, upon which certified copy of said complaint the said commissioner, Lewis F. Mason, issued his warrant for the arrest and apprehension of the parties therein named, and upon said 3rd day of March, A. D. 1899, your petitioner, by the name and style of C. F. Champion, alias W. W. Ogden, was arrested upon said warrant issued by said Commissioner Mason, and brought before said commissioner, Lewis F. Mason, for examination; that thereupon the said cause was continued until the 14th day of March; that upon the 14th day of March, when said cause was called for hearing before said Commissioner Mason, the United States of America, by and through its attorney, abandoned the said charge of conspiracy, as set forth in said certified copy of the complaint filed before said Commissioner Mason, and then and there filed with said Mason an alleged amended complaint, in which one Richard Hudson was the complainant, which complaint charged that this petitioner alone, on or about the 15th day of February, A. D. 1899, at Dallas, in the northern district of Texas, unlawfully did cause to be carried and transferred by the Wells-Fargo Express Company from the State of Texas to the Territory of New Mexico divers tickets in and advertisement of a lottery, to wit, a lottery in the same tickets and advertisements, called the Pan-American lottery, and therein described as a lottery then being conducted by the Pan-American Lottery Company, with drawings monthly at Ascuncion, Paraguay, in violation of section 1 of the act of March 2nd, 1895, 2 Sup. Revised Statutes United States, 435; that a hearing was had upon said alleged amended complaint. The said commissioner, Lewis F. Mason, found that there was probable cause for believing your petitioner had committed the offence charged in said amended complaint, and thereupon ordered your petitioner to enter into recognizance, with sufficient surety in the sum of $1,000, for his appearance for trial on said charge at the May term of
4 the district court of the United States in the northern district of Texas, or, in default thereof, to be committed to jail; and your petitioner, not offering such recognizance, was thereupon remanded to the custody of John C. Ames, United States marshal for the northern district of Illinois, to be by him so held until discharged by due course of law.

Your petitioner further represents that on the 22nd day of March, A. D. 1899, the United States of America, by and through its attorney, Mr. S. H. Bethea, made application to the Honorable C. C. Kohlsaat, judge of the district court of said northern district of Illinois, for a warrant of removal of your petitioner to the northern district of Texas, under the provisions of section 1014 of the Revised Statutes of the United States, which warrant of removal was issued by said judge, and thereupon your petitioner sued out before the circuit court of the United States for the northern district of Illinois a writ of *habeas corpus*, which said writ commanded the said marshal, John C. Ames, to forthwith bring the body of your petitioner before the Honorable P. S. Grosscup, one of the judges of said court; that afterwards, on the 30th day of March, A. D. 1899, said cause being heard by the Honorable James G. Jenkins, one of the judges of the circuit court of the United States in and for said northern district of Illinois, — ordered that your petitioner be discharged upon said writ of *habeas corpus;* from which order of discharge the United States of America prayed for and obtained an appeal to the United States circuit court of appeals for the seventh circuit, which said appeal is now pending and undetermined in said court.

Your petitioner further represents that he is now restrained of his liberty by John C. Ames, Esquire, United States marshal in and for the northern district of Illinois, by virtue of a certain warrant of commitment issued by said Lewis F. Mason, United States commissioner in and for the northern district of Illinois, a copy of
5 which said warrant of commitment is hereto attached, marked "Exhibit A," and made a part of this petition; that said commitment was issued by reason of the filing before said Commissioner Mason on the 9th day of May, A. D. 1899, of a complaint made by G. H. Voss, charging this petitioner, one W. F. Champion, and one Charles B. Park with the violation of section 5440 of the Revised Statutes of the United States, in conspiring to commit an offence against the United States, to wit, to be caused to be carried from the State of Texas to other States, by express, lottery tickets and advertisements of a lottery, in violation of the act of Congress passed March 2nd, 1895—2 Supp. Revised Statutes of the United States, 435—and the hearing on said complaint; on which hearing a certified copy of an indictment found against your petitioner and said W. F. Champion and C. B. Park in and for the district court of the United States for the northern district of Texas, and a transcript of the record and proceedings of the case upon which your petitioner was originally arrested before said commissioner, as heretofore set forth, and tried, which said transcript is a record of the proceedings of the circuit court of the United States in and for the northern district of Illinois, upon the writ of *habeas corpus* heretofore set forth, upon which your petitioner was discharged by said circuit court, and which said cause is now pending on appeal in the United States circuit court of appeals for the seventh circuit, said transcript containing a record of all the proceedings in said cause from the time of the arrest of this petitioner until the time of the perfecting of the appeal by the United States from this petitioner's

discharge in said circuit court of the United States, and containing all the testimony and evidence heard before the United States commissioner or the circuit court of the United States, upon the charge of which your petitioner was discharged upon said writ of *habeas corpus*.

Your petitioner further shows that no other testimony or evi-
6 dence was heard by said commissioner, Lewis F. Mason, touching the charge for which he now stands committed, except as heretofore set forth, and that his detention by said United States marshal upon said commitment is solely by virtue of said complaint, certified copy of indictment, and transcript of the record of the cause now pending in the United States circuit court of appeals for the seventh circuit, as heretofore set forth.

Your petitioner attaches herewith a copy of the complaint filed before said commissioner, which is marked "Exhibit B" and made a part hereof; the warrant for the apprehension of your petitioner issued by said Commissioner Mason, which is marked "Exhibit C" and made a part hereof; a copy of the certified copy of the indictment filed with said commissioner, which is marked "Exhibit D" and made a part hereof, and said transcript of the record of the cause of The United States *vs.* C. F. Champion, now pending in the United States circuit court of appeals for the seventh circuit, which is marked "Exhibit E" and made a part hereof.

Your petitioner further shows, as set forth in the said complaint last filed with said Commissioner Mason, that the offence for which your petitioner is indicted is the same offence and the same transaction as that wherein your petitioner was heretofore discharged by the circuit court of the United States of the northern district of Illinois upon the writ of *habeas corpus*, as heretofore set forth.

Your petitioner further shows that the United States of America, by the complaint charging this petitioner with the offence of conspiracy last filed before said Commissioner Mason, contends that the offence for which your petitioner now stands indicted in the district court in the northern district of Texas is for the same offence and same transaction and based upon the same evidence upon which and for which your petitioner was discharged by said United States circuit court upon said writ of *habeas corpus* aforesaid.

Your petitioner further states upon credible information
7 and belief, which he believes to be true, that no other witness appeared before the grand jury of the district court for the northern district of Texas to testify against your petitioner for the commission of the alleged offence for which he was indicted except Thomas H. Nesmith, Clark Arnold, E. J. Riley, Richard Hudson, and G. E. Robinson, who are the same persons who testified before said Commissioner Mason upon the charge of which your petitioner was originally tried before said commissioner and discharged on *habeas corpus*, as heretofore set forth, and that such witnesses before said grand jury testified to the same facts, and no other, which they had previously testified to before said Commissioner Mason.

Your petitioner further shows that the said testimony of said wit-

nesses is to be found in the transcript of the record, hereto attached and marked "Exhibit E," from pages 14 to 46, inclusive; that the original complaint on which your petitioner was arrested on March 3, 1899, is to be found on pages 59 and 60 of said transcript of the record; that the alleged amended complaint made by Richard Hudson aforesaid is to be found on page 66 of said transcript of record; that the warrant of removal of said district court, as heretofore set forth, is to be found on page 8 of said transcript of the record.

Your petitioner further shows that his present detention on said warrant of commitment by said John C. Ames and his imprisonment thereunder is unjust and contrary to law for the following reasons:

First. The indictment found by the district court for the northern district of Texas is vague, uncertain, and indefinite, and does not charge an offence against any statute or law of the United States of America.

Second. The offence which it is alleged in said indictment your petitioner and said other accused persons conspired to com-
8 mit, to wit, the violation of section 1 of the act of Congress passed March 2nd, 1895—2 Supp. Revised Statutes United States, page 435—is not such an offence as the Congress of the United States had the right to create, and that Congress exceeded its power in passing the said statute, in that such power was not conferred upon Congress by the Constitution of the United States, and such statute is null and void.

Third. The statute last above mentioned, which created the offence which it is charged by said indictment and said complaint last filed before said Commissioner Mason your petitioner and said other accused persons conspired to violate, is unconstitutional and void and contrary to the first amendment to the Constitution of the United States, in that the same abridges the freedom of the press.

Fourth. There was no testimony of any kind or character heard by the grand jury of the district court of the United States for the northern district of Texas which found said indictment showing or tending in any way to show that the offence of conspiracy had been committed, or that your petitioner or any of said parties were party or parties to any such conspiracy.

Fifth. There was no testimony heard before the United States commissioner, Lewis F. Mason, upon whose warrant of commitment your petitioner is now being held, showing or tending to show that the offence of conspiracy, as charged in said indictment and said complaint, had been committed, or that your petitioner or any of the other accused persons were parties to any such conspiracy.

Sixth. There was no evidence of any kind or character heard by or presented to said Commissioner Mason showing or tending to show that there was probable cause for believing that your petitioner was guilty of the offence charged in said indictment or said complaint or any grounds or reason shown to said commissioner which warranted him in finding that there was probable cause for believing that your petitioner was guilty of the offence charged in said complaint or said indictment.

Seventh. There is no testimony of any kind or character within the possession or knowledge of the United States of America or its proper officers showing or tending to show that the offence of conspiracy was ever committed, as charged in the indictment heretofore set forth, or, if any such offence was committed, that your petitioner was a party thereto.

Eighth. If the offence charged in the indictment has been committed, it fully appeared before the United States Commissioner Mason, as shown by the transcript of the record of said cause now pending in the United States circuit court of appeals, as aforesaid, that at the time alleged when said offence of conspiracy was committed your petitioner could not have been a party to such alleged conspiracy, for the reason that he was not within the State of Texas or within the jurisdiction of the district court of the northern district of Texas, but was in the city of Chicago, Cook county, Illinois, and that he did not advise, aid, abet, assist, counsel, or incite said offence.

Your petitioner further shows that he is not restrained of his liberty by the said John C. Ames, United States marshal, by any other process of any kind or character excepting as hereinbefore set forth, and your petitioner shows that he is innocent of the crime or offence alleged against him in the said complaint and said indictment or of any crime or offence against the statutes and laws of the United States, and upon the hearing of the matter before this honorable court his innocence in the premises will be manifest.

Your petitioner further shows that it will be necessary for this honorable court to have before him all the proceedings before the said United States commissioner, said Lewis F. Mason, in the premises.

Your petitioner therefore prays that a writ of *habeas corpus* forthwith issue by order of this honorable court, pursuant to the Constitution of the United States of America and the laws thereof,

10 commanding the said John C. Ames, said United States marshal, forthwith to produce before your honor the body of this petitioner, Charles F. Champion, so that the cause and legality of his detention may be inquired into, and that upon the hearing of this petition this petitioner may be discharged from the custody of said John C. Ames, said United States marshal of the northern district of Illinois.

This petitioner prays that a writ of certiorari issue, pursuant to law, in aid of the writ of *habeas corpus*, forthwith commanding the said Lewis F. Mason, said United States commissioner, to bring before your honor all records and proceedings before him, the said Lewis F. Mason, said United States commissioner, touching the arrest, apprehension, examination, and committment of this petitioner in the premises, as hereinbefore set forth.

And your petitioner will ever pray, etc.

CHARLES F. CHAMPION.

JOSEPH B. DAVID AND
MORITZ ROSENTHAL,
*Att'ys for Petitioner.*

UNITED STATES OF AMERICA,
*State of Illinois, Northern District of Illinois, County of Cook,* } ss:

Before me, S. W. Burnham, clerk, personally appeared Charles F. Champion, the foregoing petitioner, well known to me to be the same person whose name is subscribed to the foregoing petition, and who, being first duly sworn, on oath says that he has read the foregoing petition by him subscribed, and that he knows the contents thereof, and that the same is true in substance and in fact.

S. W. BURNHAM, *Clerk.*

11 Let the writ of *habeas corpus* issue as prayed for, returnable before the Honorable James G. Jenkins, circuit court judge, on Tuesday, the 27th day of June, 1899, at ten o'clock a. m., and the petitioner, Charles F. Champion, may be enlarged upon his own recognizance in the sum of $1,000, upon depositing with the clerk of this court a certified check on the First national bank for the sum of $1,000, or the amount of $1,000 in cash, for his faithful observance of the condition of his recognizance and for his appearance on said 27th day of June, 1899, and from day to day, as aforesaid; and let the writ of certiorari issue as prayed for, commanding Lewis F. Mason, United States circuit court commissioner, to forthwith produce before this court all his records and proceedings in the case of The United States of America *vs.* Charles F. Champion *et al.*, in which case complaint was filed before said commissioner, Lewis F. Mason, on the 9th day of May, 1899.

Ent'd June 22, 1899.

KOHLSAAT, *J.*

12 EXHIBIT "A."

The President of the United States of America to the marshal of the northern district of Illinois and to the keeper of the common jail of the county of Cook, in said district, Greeting:

Whereas C. F. Champion has been apprehended and brought before the undersigned, Lewis F. Mason, a United States commissioner for the district aforesaid, for examination by virtue of a warrant of the said commissioner issued upon complaint made before him in writing, on oath, charging the said C. F. Champion with conspiring with others at Dallas, in the northern district of Texas, to commit an offense against the said United States, to wit, an offense denounced by the act of March 2, 1895 (2 Suppl. R. S., 435)—that is to say, to cause to be carried and transferred from one State to another of the said United States certain lottery tickets and advertisements, contrary to section 5440, R. S. U. S.;

And whereas on such examination there appears probable cause to believe the said C. F. Champion guilty of the said offense, and the undersigned commissioner as aforesaid has ordered the said C. F. Champion to enter into recognizance with sufficient surety in the sum of one thousand dollars for his appearance for trial on the said

charge at the January term of the district court of the United States for the northern district of Texas, or in default thereof to be committed to jail; and whereas the said C. F. Champion has not offered such recognizance: Now, therefore, you, the said marshal, are hereby commanded that you convey the said C. F. Champion to the said jail; and you, the said keeper, are hereby commanded that you receive the said —— —— into the said jail, and him there safely keep until he be discharged therefrom by due course of law.

Witness the hand and seal of the said commissioner at Chicago aforesaid, in the said division and district, this 22nd day of
13 June, A. D. 1899, and of the Independence of the said United States the 123 year.

(Signed) LEWIS F. MASON,
*U. S. Commissioner.*

(Endorsed:) No. —. Northern district of Illinois, northern division. Before Lewis F. Mason, U. S. commissioner. The United States of America *vs.* C. F. Champion. Mittimus. Bail, $1,000.00. (Signed) Lewis F. Mason, U. S. commissioner.

14 EXHIBIT "B."

THE UNITED STATES OF AMERICA,
*Seventh Circuit, Northern District of Illinois, Northern Division,* } *sct:*

On this ninth day of May, A. D. 1899, at the city of Chicago, in the northern division of the northern district of Illinois, before Lewis F. Mason, a commissioner of the United States for the said district, comes G. H. Voss, of the city of Chicago and of said division and district, who, being duly sworn, upon his oath complains and says that on, to wit, the first day of February, 1899, in Dallas county, Texas, in the northern district of Texas, C. F. Champion, alias W. W. Ogden, W. F. Champion, and Charles B. Park did then and there unlawfully, knowingly, and feloniously conspire together to commit an offense against the United States, to wit, for the purpose of disposing of the same, to cause to be carried from one State to another in the United States, to wit, from Dallas, in the State of Texas, to Fresno, in the State of California, certain papers, certificates, and instruments purporting to be and representing tickets, as they then and there well knew, chances, shares, and interests in and dependent upon the event of a lottery thereafter to take place, offering prizes dependent upon lot and chance—that is to say, caused to be carried, as aforesaid, for the purpose of disposing of the same, papers, certificates, or instruments purporting to be tickets to represent the chances, shares, and interests in the prizes which by lot and chance might thereafter be awarded to persons to this complainant unknown who might purchase said papers, certifi-
15 cates, or instruments representing and purporting to be tickets, as aforesaid, with the numbers thereon shown and indicated and printed, which by lot and chance should, on a certain

day thereafter, draw a prize or prizes at the purported lottery of chance company, to wit, at the purported monthly drawing of the so-called Pan-American Lottery Company, which purported to draw monthly at Ascuncion, Paraguay, which said Pan-American Lottery Company purported to be an enterprise offering prizes dependent upon lot and chance, the specific method of such drawing being unknown to this complainant, but which said papers, certificates, and instruments purporting to be and representing tickets upon their face purporting to be entitled to participation in the drawing for a certain capital prize amounting to the sum of thirty-two thousand dollars, and which said drawings for said capital prize or the part or parts thereof allotted or to be allotted, in conformity with the scheme of lot or chance, were to take place monthly, the manner and form of which is to this complainant unknown, but that said drawing and lot and chance by which said prize or prizes were to be drawn was purported to be under the supervision and direction of Enrigue Montes de Leon, manager, and Bernardo Lopez, intervenor, and which said papers, certificates, and instruments purporting to be tickets of the said Pan-American Lottery Company were so divided as to be called whole, half, quarter, and eighth tickets, the whole tickets to be sold for the sum of two dollars, the half tickets for the sum of one dollar, the quarter tickets for the sum of fifty cents, and the eighth tickets for the sum of twenty-five cents.

And the said complainant aforesaid on his oath aforesaid does further state that, in pursuance of said conspiracy and to
16 effect the object thereof, to wit, for the purpose of causing to be carried from one State to another in the United States, to wit, from the State of Texas to the State of California aforesaid, for the purpose of disposing of the same, papers, certificates, and instruments purporting to be and representing tickets, chances, and shares and interests in and dependent upon the event of a lottery, to wit, the Pan-American Lottery Company, offering prizes dependent upon lot and chance, as aforesaid, as they then and there well knew, said C. F. Champion, alias W. W. Ogden, W. F. Champion, and Charles B. Park did then and there, to wit, on or about the day last aforesaid, in the year 1899, in the county of Dallas aforesaid, in the Dallas division of the northern district of Texas aforesaid, unlawfully, knowingly, and feloniously, for the purpose of being carried from one State to another in the United States, to wit, from Dallas, in the State of Texas, to Fresno, in the State of California, for the purpose of disposing of the same, deposit and cause to be deposited and shipped and carried with and by the Wells-Fargo Express Company, a corporation engaged in carrying freight and packages from station to station along and over lines of railway and from Dallas, Texas, to Fresno, California, for hire, one certain box or package containing, among other things, two whole tickets or papers or certificates of said purported Pan-American Lottery Company, one of which said whole tickets is attached to and made a part of page three of Exhibit A, hereto attached, and the other said whole tickets being like the one aforesaid attached to Exhibit A in all particu-

lars except that it differs in numbers; and also six half tickets of said purported Pan-American Lottery Company, one of which is attached to page three of Exhibit A, hereto annexed, and
17 — other five of said half tickets being in kind like unto the one last mention- and attached as aforesaid to said Exhibit A, differing only in numbers; and also ten quarter tickets of said purported Pan-American Lottery Company, one of which is annexed to page four of said Exhibit A, and the other nine tickets being like unto the one attached to page four of said Exhibit A, differing only in numbers; also twenty tickets, denominated eight-s, of said purported Pan-American Lottery Company, one of which is also annexed to page four of Exhibit A, hereto attached, and the other nineteen of such eight-s tickets being like unto the one last above mentioned attached as aforesaid to page four of said Exhibit A, differing only in numbers, and said box so containing the said certificates or tickets being addressed and consigned by the said C. F. Champion, alias W. W. Ogden, W. F. Champion, and Charles B. Park to James A. Ward, Fresno, California, which was so addressed and so deposited with the said express company for the purpose of being carried from Dallas, in the State of Texas, to Fresno, in the State of California, and there delivered to James A. Ward for the purpose of disposing of said above-mentioned lottery tickets, and which said tickets—wholes, halves, quarters, and eight-s—purported upon their face to entitle the holder thereof to so much of such prize of thirty-two thousand dollars as the denomination of such tickets might be entitled to in the event the number upon such ticket at said drawing, which purported to take place on Wednesday, March 15, 1899, should be allotted the prize, or any part thereof, according to lot or chance, the peculiar and particular manner of which is to this complainant unknown, all of
18 which the said C. F. Champion, alias W. W. Ogden, W. F. Champion, and Charles B. Park then and there well knew, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Second count. And the said complainant, G. H. Voss, being duly sworn, as aforesaid, on his oath doth further state that on, to wit, the first day of February, 1899, in Dallas county, Texas, in the northern district of Texas, C. F. Champion, alias W. W. Ogden, W. F. Champion, and Charles B. Park did then and there unlawfully, feloniously, and knowingly conspire together to commit an offense against the United States, to wit, for the purpose of disposing of the same, to cause to be carried from one State to another in the United States, to wit, from Dallas, in the State of Texas, to Ogden, in the State of Utah, certain papers, certificates, and instruments purporting to be and representing tickets, as they then and there well knew, chances, shares, and interest- in and dependent upon the event of a lottery thereafter to take place, offering prizes dependent upon lot and chance—that is to say, caused to be carried, as aforesaid, for the purpose of disposing of the same, papers, certificates, or instruments purporting to be tickets to represent the chances, shares, and interests in the prizes which by lot and chance might thereafter be

awarded to persons to this complainant unknown who might purchase said papers, certificates, and instruments representing and purporting to be tickets, as aforesaid, with the numbers thereon shown and indicated and printed, which by lot and chance should on a certain day thereafter draw a prize or prizes at the
19 purported lottery or chance company, to wit, at the purported monthly drawing of the so-called Pan-American Lottery Company, which purported to draw monthly at Ascuncion, Paraguay, which said Pan-American Lottery Company purported to be an enterprise offering prizes dependent upon lot and chance, the specific method of such drawing being unknown to this complainant, but which said papers, certificates, and instruments purporting to be and representing tickets upon their face purporting to be entitled to participation in the drawing for a certain capital prize amounting to the sum of thirty-two thousand dollars, and which said drawings for said capital prize or the part or parts thereof allotted or to be allotted in conformity with the scheme or lot and chance were to take place monthly, the manner and form of which is to the complainant unknown, but that said drawing and lot and chance by which said prize or prizes were to be drawn was purported to be under the supervision and direction of Enrigue Montes de Leon, manager, and Bernardo Lopez, intervenor, and which said papers, certificates, and instruments purporting to be tickets of the said Pan-American Lottery Company were so divided as to be called whole, half, quarter, and eighth tickets, the whole tickets to be sold for the sum of two dollars, the half tickets for the sum of one dollar, the quarter tickets for the sum of fifty cents, and the eight- tickets for the sum of twenty-five cents.

And the said complainant on his oath doth further state that in pursuance of said conspiracy and to effect the object thereof, to wit, for the purpose of causing to be carried from one State to another in the United States, to wit, from the State of Texas to the State of Utah aforesaid, for the purpose of disposing of the same,
20 papers, certificates, and instruments purporting to be and representing tickets, chances, and shares and interests in and dependent upon the event of a lottery, to wit, the Pan-American Lottery Company, offering prizes dependent upon lot and chance, as aforesaid, as they then and there well knew, said C. F. Champion, alias W. W. Ogden, W. F. Champion, and Charles B. Park did then and there, to wit, on or about the day last aforesaid, in the year 1899, in the county aforesaid, in the Dallas division of the northern district of Texas aforesaid, unlawfully, knowingly, and feloniously, for the purpose of being carried from one State to another in the United States, to wit, from Dallas, in the State of Texas, to Ogden, in the State of Utah, for the purpose of disposing of the same, deposit and cause to be deposited and shipped and carried with and by the Wells-Fargo Express Company, a corporation engaged in carrying freight and packages from station to station along and over lines of railway from Dallas, Texas, to Ogden, Utah, for hire, one certain box or package, containing, among other things, two whole tickets or papers or certificates of said purported Pan-American

Lottery Company, one of which said whole tickets is attached to page seven of Exhibit A and made a part of said Exhibit A, and the other said whole tickets being like the one last aforesaid attached, as aforesaid, to page seven of said Exhibit A in all particulars, except that it differs in numbers; also six half tickets of said purported Pan-American Lottery Company, one of which is annexed to page seven of said Exhibit A and made a part thereof, the other five of said half tickets being in kind like unto the one last aforesaid attached, as aforesaid, to page seven of Exhibit A, as
21 aforesaid, differing only in numbers; also twenty tickets, denominated eighths, of said purported Pan-American Lottery Company, one of which is annexed to page eight of Exhibit A and made a part thereof, the other nineteen of such eighths tickets being like unto the one attached, as aforesaid, to page eight of Exhibit A, as aforesaid, differing only in numbers, and the said box so containing the said certificates or tickets being addressed and consigned by the said C. F. Champion, alias W. W. Ogden, W. F. Champion, and Charles B. Park to Livingston & Blosser, 2477 Washington avenue, Ogden, Utah, which was so addressed and so deposited with the said express company for the purpose of being carried from Dallas, in the State of Texas, to Ogden, in the State of Utah, and there delivered to Livingston & Blosser for the purpose of disposing of such above-mentioned lottery tickets, and which said tickets, wholes, halves, quarters, and eighths purported upon their face to entitle the holder thereof to so much of said prize of thirty-two thousand dollars as the denomination of such tickets might be entitled to in the event the number upon such ticket at said drawing, which purported to take place on, to wit, Wednesday, March 15th, 1899, should be allotted the prize or any part thereof according to lot or chance, the peculiar and particular manner of which is to the complainant unknown, all of which the said C. F. Champion, alias W. W. Ogden, W. F. Champion, and Charles B. Park then and there well knew, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And so the complainant, G. H. Voss, aforesaid on his oath aforesaid doth further state that the offense set out in section 5440
22 of the Revised Statutes of the United States, which is as follows:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than two years."

has been committed, and that the offense which the defendant-, C. F. Champion, alias W. W. Ogden, W. F. Champion, and Charles B. Park, conspired to commit is set forth and defined in the act for the suppression of lottery traffic through national and interstate com-

merce and the postal service, subject to the jurisdiction and laws of the United States, which was passed on March 2, 1895; and the said complainant on his oath further states that he has just and reasonable grounds to believe and does believe that C. F. Champion, alias W. W. Ogden, W. F. Champion, and Charles B. Park committed said offense, and the grounds and reasons for his belief are the fact that the grand jury for the United States for the northern district of Texas has found an indictment against said defendants for said crime, a certified copy of which is hereto attached and made a part of this complaint and marked Exhibit A, and the further fact that the complainant was present at the examination of the defendant Charles F. Champion before Commissioner Lewis F. Mason, when the said defendant was charged with the violation of the said act of March 2, 1895, in which proceeding the same acts of the said defendants were relied upon for conviction as are relied upon in this case, and this complainant heard all of the testimony and statements of the witnesses produced upon the hearing
23 and all of the evidence introduced thereon, and that afterwards he was present at the subsequent proceedings in reference thereto and heard what was presented before the courts and the opinion of Judge Jenkins in his final disposition of the *habeas corpus* proceedings in reference to said offense. A copy of the record of all of said proceedings before said commissioner and before the courts and judges of the United States is hereto attached and marked Exhibit B and made a part of this complaint; which said copy contains a true and correct recital of all that transpired in reference to said offense; and this complainant further states that the said proceedings, a copy of which is hereto attached and marked Exhibit B, took place before the finding of the indictment shown by Exhibit A.

Wherefore this complainant prays that the said C. F. Champion, alias W. W. Ogden, W. F. Champion, and Charles B. Park may be apprehended and further dealt with according to law.

(Signed) G. H. VOSS.

Subscribed and sworn to before me by the above-named G. H. Voss the day and year first above written.

(Signed) LEWIS F. MASON,
[SEAL.] *Commissioner.*

Approved:

*U. S. Att'y, N. Dist. Ill.*

24 EXHIBIT C.

The President of the United States of America to the marshal of the northern district of Illinois:

Whereas complaint in writing on oath has been made to the undersigned, Lewis F. Mason, a United States commissioner for the district aforesaid, charging that C. F. Champion, alias W. W. Ogden,

W. F. Champion, Charles B. Parks, on or about the first day of February, A. D. one thousand 899, at Dallas, Texas, within the Waco division of the northern district of Texas, did violate the laws of the United States, to wit, section 5440 as amended and act of March 2nd, 1895, third session, 53rd Congress, did conspire together to commit an offense against the United States, to wit, for the purpose of disposing — the same, to cause to be carried from one State to another in the United States, to wit, from Dallas, Texas, to Fresno, in the State of California, certain papers, certificates, & instruments purporting to be and representing tickets, as they then and there well knew, chances, shares, & interest- in — dependent upon the event of a lottery thereafter to take place on a certain day at the purported monthly drawing of the so-called Pan-American Lottery Company:

Now, therefore, you are hereby commanded that you take the said C. F. Champion, alias W. W. Ogden, W. F. Champion, Charles B. Park, (if they be found within your district) and them safely keep, so that you have *his* bodies forthwith before the undersigned, commissioner as aforesaid, at his office, in Chicago, in the
25 said district (or, in case of his absence or inability to act, before any other United States commissioner or judicial officer having jurisdiction), in order that the said C. F. Champion, alias W. W. Ogden, W. F. Champion, & C. B. Park may be dealt with according to law; and have you then and there this writ with a return of your doings hereon.

Witness the hand and seal of the said commissioner, at Chicago aforesaid, this 10th day of May, A. D. one thousand 899, and of the Independence of the United States the 123 year.

[SEAL.]
[L. S.]

LEWIS F. MASON.
*U. S. Commissioner.*

Endorsed: Return. Received this warrant on the 10th day of May, 1899, at Chicago, and executed the same by arresting the within-named C. F. Champion, at Chicago, the 10th day of May, 1899, and have his body now in court, as within I am commanded. Dated Chicago, Ill., May 10th, 1899. John C. Ames, U. S. marshal, by C. W. Walser, deputy. Filed Jun- 22, 1899. S. W. Burnham, clerk.

26 "EXHIBIT D."

THE UNITED STATES OF AMERICA, *Northern District of Texas,* } *To wit:*

In the District Court of the United States within and for the Northern District of Texas.

(First count, 5440, as amended, and act March 2nd, 1895, third session, 53rd Congress.)

In the name and by the authority of the United States of America: The grand jurors of the United States within and for the district aforesaid, at Waco, division of said district, duly selected, im-

panelled, sworn, and charged to inquire into and true presentment make of all crimes and offenses cognizable under the authority of the United States committed within said northern district of Texas, upon their oaths present in open court that before the filing and presentment of this indictment, to wit, on or about the 1st day of February, A. D. 1899, in Dallas county, Texas, in the northern district of Texas and within the jurisdiction of this court, C. F. Champion, alias W. W. Ogden, W. F. Champion, and Charles B. Park did then and there unlawfully, knowingly, and feloniously conspire together to commit an offense against the United States, to wit, for the purpose of disposing of the same, to cause to be carried from one State to another in the United States, to wit, from Dallas, in the State of Texas, to Fresno, in the State of California, certain papers, certificates, and instruments purporting to be and representing tickets, as they then and there well knew, chances, shares, and interests in and dependent upon the event of a lottery, offering prizes dependent upon lot and chance—that is to say,

caused to be carried, as aforesaid, for the purpose of disposing of the same, papers, certificates, or instruments purporting to be tickets to represent the chances, shares, and interests in the prizes which by lot and chance might be awarded to persons, to these grand jurors unknown, who might purchase said papers, certificates, and instruments representing and purporting to be tickets, as aforesaid, with the numbers thereon shown and indicated and printed, which by lot and chance should, on a certain day, draw a prize or prizes at the purported lottery or chance company, to wit, at the purported monthly drawing of the so-called Pan-American Lottery Company, which purported to draw monthly at Ascuncion, Paraguay, which said Pan-American Lottery Company purported to be an enterprise offering prizes dependent upon lot and chance, the specific method of such drawing being unknown to the grand jurors, but which said papers, certificates, and instruments purporting to be and representing tickets upon their face purporting to be entitled to participation in the drawing for a certain capital prize amounting to the sum of thirty-two thousand dollars, and which said drawings for said capital prize, or the part or parts thereof allotted or to be allotted in conformity with the scheme of lot and chance, were to take place monthly, the manner and form of which is to the grand jurors unknown, but that said drawing and lot and chance by which said prize or prizes were to be drawn was purported to be under the supervision and direction of Enrigue Montes de Leon, manager, and Bernardo Lopez, intervenor, and which said papers, certificates, and instruments purporting to be tickets of the said Pan-American Lottery Company

were so divided as to be called whole, half, quarter, and eighth tickets, the whole tickets to be sold for the sum of two dollars, the half tickets for the sum of one dollar, the quarter tickets for the sum of fifty cents, and the eighth tickets for the sum of twenty-five cents.

And the grand jurors upon their oaths aforesaid do further present that in pursuance of said conspiracy and to effect the object

thereof, to wit, for the purpose of causing to be carried from one State to another in the United States, to wit, from the State of Texas to the State of California aforesaid, for the purpose of disposing of the same, papers, certificates, and instruments purporting to be and representing tickets, chances, and shares and interests in and dependent upon the event of a lottery, to wit, the Pan-American Lottery Company, offering prizes dependent upon lot and chance, as aforesaid, as they then and there well knew, said W. F. Champion and Charles B. Park did then and there, to wit, on or about the date last aforesaid, in the year 1899, in the county aforesaid, in the Dallas division of the northern district of Texas aforesaid, unlawfully, knowingly, and feloniously, for the purpose of being carried from one State to another in the United States, to wit, from Dallas, in the State of Texas, to Fresno, in the State of California, for the purpose of disposing of the same, deposit and cause to be deposited and shipped and carried with and by the Wells-Fargo Express Company, a corporation engaged in carrying freight and packages from station to station along and over lines of railway and from Dallas, Texas, to Fresno, California, for hire, one certain box or package containing, among other things, two whole tickets or papers or certificates of said purported Pan-American Lottery Company, one of which said whole tickets is hereto annexed by the
29 & 30 grand jury to this indictment and made a part hereof, for the reason that the same has much printed matter that is improper and too lengthy to set out in this indictment accurately, and for that reason the tickets is annexed hereto in its entirety:

Whole, class C.

Pan-American Lottery Co.

Capital prize, $32,000.

Drawe monthly at Ascuncion, Paraguay.

Will draw on Wednesday, March 15th, 1899.

1530. [3127.]* This whole ticket entitles the holder thereof to the whole of said prize as may be drawn by the number in the within-named drawing if presented before the expiration of three months from the date of said drawing. Three, cipher, five, four, five. 30545.

Two dollars.

ENRIQUE MONTES DE LEON, *Manager.*
FERNANDO LOPEZ, *Intervenor.*

(Back.)

All genuine tickets are signed by Enrique Montes de Leon, manager, and Fernando Lopez, intervenor, and will not hold good if mutilated, pierced, or in any way altered from the original.

[*Words and figures enclosed in brackets erased in copy.]

*List of Prizes.*

| | | |
|---|---|---|
| 1 prize | $32,000 | $32,000 |
| 1 prize | 15,000 | 15,000 |
| 1 prize | 5,000 | 5,000 |
| 1 prize | 2,000 | 2,000 |
| 3 prizes | 500 | 1,500 |
| 10 prizes | 200 | 2,000 |
| 20 prizes | 100 | 2,000 |
| 100 prizes | 50 | 5,000 |
| 200 prizes | 30 | 6,000 |
| 300 prizes | 20 | 6,000 |
| 300 prizes | 10 | 6,000 |

*Approximation Prizes.*

| | | |
|---|---|---|
| 150 prizes | $20 | $3,000 |
| 150 prizes | 10 | 1,500 |
| 150 prizes | 8 | 1,200 |
| 150 prizes | 8 | 1,200 |

31

*Terminals.*

| | | |
|---|---|---|
| 999 prizes | $10 | 9,990 |
| 999 prizes | 10 | 9,990 |
| 999 prizes | 4 | 3,996 |
| 999 prizes | 4 | 3,996 |
| 5,733 prizes, amounting to | | $116,372 |

We personally supervise all drawings of the Pan-American lottery, and our signatures witness that we guarantee the perfect fairness of said drawings.

ENRIQUE MONTES DE LEON, *Manager.*
FERNANDO LOPEZ, *Intervenor.*

*Certificate.*

Since September, 1893, I have paid as presented, without delay or discount, all prizes drawn in the Pan-American lottery, and I certify that the Pan-American Lottery Company has placed in my charge an amount of money amply sufficient to guarantee the payment of all prizes which may be drawn in the Pan-American lottery, and that said prizes will be paid upon presentation to me or to any of the general State agents representing the Pan-American lottery in the United States.

The general State agents will keep deposits with the following national banks:

Equitable national bank, Cincinnati, Ohio.
Third national bank, St. Louis, Mo.
City national bank, Dallas, Texas.
National Bank of Commerce, Omaha, Nebraska.

Franklin national bank, New York.
First National Bank of San Francisco, California.

J. C. BOCA,
*General Agent for the United States.*

And the other said whole tickets being like the one hereto annexed in all particulars except that it differs in numbers; also six half tickets of said purported Pan-American Lottery Company, one of which is heret annexed in its entirety, for the reason that the grand jurors are unable to accurately describe the same because of the printing and cuts thereon contained, the other five of said half tickets being in kind like unto the one hereto attached in its entirety and made a part hereof:

32

Half, class C.

Pan-American Lottery Co.

Capital prize, $32,000.

Draws monthly at Ascuncion, Paraguay.

Will draw on Wednesday, March 15th, 1899.

This half ticket entitles the holder thereof to the half of said prize as may be drawn by the number in the within-named drawing if presented before the expiration of three months from the date of said drawing.

Eight, five, three, six, seven.
[Two, six, four, seven, three.]*
[26473.]*
85367.

3999. [2447.]*

One dollar.

ENRIQUE MONTES DE LEON, *Manager.*
FERNANDO LOPEZ, *Intervenor.*

(Back.)

All genuine tickets are signed by Enrique Montes de Leon, manager, and Fernando Lopez, intervenor, and will not hold good if mutilated, pierced, or in any way altered from the original.

*List of Prizes.*

| | | |
|---|---|---|
| 1 prize | $32,000 | $32,000 |
| 1 prize | 15,000 | 15,000 |
| 1 prize | 5,000 | 5,000 |
| 1 prize | 2,000 | 2,000 |
| 3 prizes | 500 | 1,500 |
| 10 prizes | 200 | 2,000 |
| 20 prizes | 100 | 2,000 |
| 100 prizes | 50 | 5,000 |
| 200 prizes | 30 | 6,000 |
| 300 prizes | 20 | 6,000 |
| 500 prizes | 10 | 6,000 |

[* Words and figures enclosed in brackets erased in copy.]

*Approximation Prizes.*

| | | |
|---|---|---|
| 150 prizes | $20 | $3,000 |
| 150 prizes | 10 | 1,500 |
| 150 prizes | 8 | 1,200 |
| 150 prizes | 8 | 1,200 |

33 *Terminals.*

| | | |
|---|---|---|
| 999 prizes | $10 | 9,990 |
| 999 prizes | 10 | 9,990 |
| 999 prizes | 4 | 3,996 |
| 999 prizes | 4 | 3,996 |
| 5,733 prizes, amounting to | | $116,372 |

We personally supervise all drawings of the Pan-American lottery, and our signatures witness that we guarantee the perfect fairness of said drawings.

ENRIQUE LOPEZ, *Manager.*
FERNANDO LOPEZ, *Intervenor.*

*Certificate.*

Since September, 1893, I have paid as presented, without delay or discount, all prizes drawn in the Pan-American lottery, and I certify that the Pan American Lottery Company has placed in my charge an amount of money amply sufficient to guarantee the payment of all prizes which may be drawn in the Pan-American lottery, and that said prizes will be paid upon presentation to me or to any of the general State agents representing the Pan-American lottery in the United States.

The general State agents will keep deposits with the following national banks:

Equitable national bank, Cincinnati, Ohio.
Third national bank, St. Louis, Mo.
City national bank, Dallas, Texas.
National Bank of Commerce, Omaha, Nebraska.
Franklin national bank, New York.
First National Bank of San Francisco, California.

J. C. BOCA,
*General Agent for the United States.*

differing only in numbers; also ten quarter tickets of said purported Pan-American Lottery Company, one of which is hereto annexed in its entirety. Because of the printing and cuts thereon it would be impossible and improper for the grand jurors to fully set the same out otherwise, the other nine tickets being like unto the one hereto annexed in its entirety and made a part hereof:

34

Quarter, class C.

Pan-American Lottery Co.

Capital prize, $32,000.

Draws monthly at Ascuncion, Paraguay.

Will draw on Wednesday, March 15th, 1899.

This quarter ticket entitles the holder thereof to the quarter of said prize as may be drawn by the number in the within-named drawing if presented before the expiration of three months from the date of said drawing.

Six, five, eight, nine, three.
[Five, cipher, nine, two, seven.]*
[50927.]*
65893.

4467.
4461.

50 cents.

ENRIQUE MONTES DE LEON, *Manager.*
FERNANDO LOPEZ, *Intervenor.*

(Back.)

All genuine tickets are signed by Enrique Montes de Leon, manager, and Fernando Lopez, intervenor, and will not hold good if mutilated, pierced, or in any way altered from the original.

*List of Prizes.*

| | | |
|---|---|---|
| 1 prize | $32,000 | $32,000 |
| 1 prize | 15,000 | 15,000 |
| 1 prize | 5,000 | 5,000 |
| 1 prize | 2,000 | 2,000 |
| 3 prizes | 500 | 1,500 |
| 10 prizes | 200 | 2,000 |
| 20 prizes | 100 | 2,000 |
| 100 prizes | 50 | 5,000 |
| 200 prizes | 30 | 6,000 |
| 300 prizes | 20 | 6,000 |
| 500 prizes | 10 | 6,000 |

*Approximation Prizes.*

| | | |
|---|---|---|
| 150 prizes | $20 | $3,000 |
| 150 prizes | 10 | 1,500 |
| 150 prizes | 8 | 1,200 |
| 150 prizes | 8 | 1,200 |

35

*Terminals.*

| | | |
|---|---|---|
| 999 prizes | $10 | 9,990 |
| 999 prizes | 10 | 9,990 |
| 999 prizes | 4 | 3,996 |
| 999 prizes | 4 | 3,996 |
| 5,733 prizes, amounting to | | $116,372 |

[* Words and figures enclosed in brackets erased in copy.]

We personally supervise all drawings of the Pan-American lottery, and our signatures witness that we guarantee the perfect fairness of said drawings.

ENRIQUE LOPEZ, *Manager.*
FERNANDO LOPEZ, *Intervenor.*

*Certificate.*

Since September, 1893, I have paid as presented, without delay or discount, all prizes drawn in the Pan-American lottery, and I certify that the Pan-American Lottery Company has placed in my charge an amount of money amply sufficient to guarantee the payment of all prizes which may be drawn in the Pan-American lottery, and that said prizes will be paid upon presentation to me or to any of the general State agents representing the Pan-American lottery in the United States.

The general State agents will keep deposits with the following national banks:

Equitable national bank, Cincinnati, Ohio.
Third national bank, St. Louis, Mo.
City national bank, Dallas, Texas.
National Bank of Commerce, Omaha, Nebraska.
Franklin national bank, New York.
First National Bank of San Francisco, California.

J. C. BOCA,
*General Agent for the United States.*

differing only in numbers; also twenty tickets denominated eight-s of said purported Pan-American Lottery Company, one of which is annexed hereto in its entirety and made a part of this indictment, because the grand jurors are unable to accurately describe the same by reason of the great amount of printed matter and cuts thereon contained, the other nineteen of such eighths tickets being like unto the one hereto attached and annexed in its entirety and made a part hereof:

36

Eighth, class C.

Pan-American Lottery Co.

Capital prize, $32,000.

Draws monthly at Ascuncion, Paraguay.

Will draw on Wednesday, March 15th, 1899.

5334. [6319.]*

This eighth ticket entitles the holder thereof to the eighth of said prize as may be drawn by the number in the within-named drawing if presented before the expiration of three months from the date of said drawing.

Five, one, eight, cipher, cipher. [Five, four, two, seven, eight.]* [54278.]* 51800.

25 cents.

ENRIQUE MONTES DE LEON, *Manager.*
FERNANDO LOPEZ, *Intervenor.*

[* Words and figures enclosed in brackets erased in copy.]

(Back.)

All genuine tickets are signed by Enrique Montes de Leon, manager, and Fernando Lopez, intervenor, and will not hold good if mutilated, pierced, or in any way altered from the original.

*List of Prizes.*

| | | |
|---|---|---|
| 1 prize | $32,000 | $32,000 |
| 1 prize | 15,000 | 15,000 |
| 1 prize | 5,000 | 5,000 |
| 1 prize | 2,000 | 2,000 |
| 3 prizes | 500 | 1,500 |
| 10 prizes | 200 | 2,000 |
| 20 prizes | 100 | 2,000 |
| 100 prizes | 50 | 5,000 |
| 200 prizes | 30 | 6,000 |
| 300 prizes | 20 | 6,000 |
| 500 prizes | 10 | 6,000 |

*Approximation Prizes.*

| | | |
|---|---|---|
| 150 prizes | $20 | $3,000 |
| 150 prizes | 10 | 1,500 |
| 150 prizes | 8 | 1,200 |
| 150 prizes | 8 | 1,200 |

37

*Terminals.*

| | | |
|---|---|---|
| 999 prizes | $10 | 9,990 |
| 999 prizes | 10 | 9,990 |
| 999 prizes | 4 | 3,996 |
| 999 prizes | 4 | 3,996 |
| 5,733 prizes, amounting to | | $116,372 |

We personally supervise all drawings of the Pan-American lottery, and our signatures witness that we guarantee the perfect fairness of said drawings.

ENRIQUE LOPEZ, *Manager.*
FERNANDO LOPEZ, *Intervenor.*

*Certificate.*

Since September, 1893, I have paid as presented, without delay or discount, all prizes drawn in the Pan-American lottery, and I certify that the Pan-American Lottery Company has placed in my charge an amount of money amply sufficient to guarantee the payment of all prizes which may be drawn in the Pan-American lottery, and that said prizes will be paid upon presentation to me or to any of the general State agents representing the Pan-American lottery in the United States.

The general State agents will keep deposits with the following national banks:

Equitable national bank, Cincinnati, Ohio.
Third national bank, St. Louis, Mo.
City national bank, Dallas, Texas.
National Bank of Commerce, Omaha, Nebraska.
Franklin national bank, New York.
First National Bank of San Francisco, California.

J. C. BOCA,
*General Agent for the United States.*

38 differing only in numbers, and said box so containing the said certificates or tickets being addressed and consigned by the said C. F. Champion, alias W. W. Ogden, W. F. Champion, and Charles B. Park to James A. Ward, Fresno, California, which was so addressed and so deposited with the said express company for the purpose of being carried from Dallas, in the State of Texas, to Fresno, in the State of California, and there delivered to James A. Ward, for the purpose of disposing of such above-mentioned lottery tickets, and which said tickets—wholes, halves, quarters, and eighths—purported upon their face to entitle the holder thereof to so much of such prize of thirty-two thousand dollars as the denomination of such tickets might be entitled to in the event the number upon such ticket at said drawing, which purported to take place on Wednesday, March 15th, 1899, should be allotted the prize or any part thereof, according to lot or chance, the peculiar and particular manner of which is to the grand jurors unknown, all of which the said C. F. Champion, alias W. W. Ogden, W. F. Champion, and Charles B. Park then and there well knew, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Second count. The grand jurors aforesaid, duly selected, impanelled, sworn, and charged, as aforesaid, further present into open court that before the filing and presentment of this indictment, to wit, on or about the first day of February, A. D. 1899, in Dallas county, Texas, in the northern district of Texas and within the jurisdiction of this court, C. F. Champion, alias W. W. Ogden, W. F. Champion, and Charles B. Park did then and there unlawfully, knowingly, and feloniously conspire together to commit an offense against the United States, to wit, for the purpose of disposing of the same, to cause to be carried from one State to another in the United States, to wit, from Dallas, in the State of Texas,
39 to Ogden, in the State of Utah, certain papers, certificates, and instruments purporting to be and representing tickets, as they then and there well knew, chances, shares, and interests in and dependent upon the event of a lottery, offering prizes dependent upon lot and chance—that is to say, caused to be carried, as aforesaid, for the purpose of disposing of the same, papers, certificates, or instruments purporting to be tickets to represent the chances, shares, and interests in the prizes which by lot and chance might be awarded to persons to these grand jurors unknown who

might purchase said papers, certificates, and instruments representing and purporting to be tickets, as aforesaid, with the numbers thereon shown and indicated and printed which by lot and chance should on a certain day draw prize or prizes at the purported lottery or chance company, to wit, at the purported monthly drawing of the so-called Pan-American Lot-ery Company, which purported to draw monthly at Ascuncion, Paraguay, which said Pan-American Lottery Company purported to be an enterprise offering prizes dependent upon lot and chance, the specific method of such drawing being unknown to the grand jurors, but which said papers, certificates, and instruments purporting to be and representing tickets upon their face purporting to be entitled to participation in the drawing for a certain capital prize amounting to the sum of thirty-two thousand dollars, and which said drawings for said capital prize or the part or parts thereof allotted or to be allotted in conformity with the scheme or lot and chance were to take place monthly, the manner and form of which is to the grand jurors unknown, but that said drawing and lot and chance by which said prize or prizes were to be drawn was purported to be under the supervision and direction of Enrique Montes de Leon, manager, and Bernardo Lopez, intervenor, and which said papers, certificates, and instruments purporting to be tickets on the said Pan-American Lottery Company were so divided as to be called whole, half, quarter, and eighth tickets, the whole tickets to be sold for the sum of two dollars and half tickets for the sum of one dollar, the quarter tickets for the sum of fifty cents and the eighth tickets for the sum of twenty-five cents.

And the grand jurors upon their oaths aforesaid do further present that in pursuance of said conspiracy and to effect the object thereof, to wit, for the purpose of causing to be carried from one State to another in the United States, to wit, from the State of Texas to the State of Utah aforesaid, for the purpose of disposing of the same, papers, certificates, and instruments purporting to be and representing tickets, chances, and chares and interests in and dependent upon the event of a lottery, to wit, the Pan-American Lottery Company, offering prizes dependent upon lot and chance, as aforesaid, as they then and there well knew, said W. F. Champion and Charles B. Park did then and there, to wit, on or about the day last aforesaid, in the year 1899, in the county aforesaid, in the Dallas division of the northern district of Texas aforesaid, unlawfully, knowingly, and feloniously, for the purpose of being carried from one State to another in the United States, to wit, from Dallas, in the State of Texas, to Ogden, in the State of Utah, for the purpose of disposing of the same, deposit and cause to be deposited and shipped and carried with and by the Wells-Fargo Express Company, a corporation engaged in carrying freight and packages from station to station along and over lines of railway and from Dallas, Texas, to Ogden, Utah, for hire, one certain box or package containing, among other things, two whole tickets or papers or certificates of said purported Pan-American Lottery Company, one of which said whole tickets is hereto annexed by the grand jury to this indictment and

made a part hereof for the reason that the same has much printed matter that is improper and too lengthy to set out in this indictment accurately, and for that reason the ticket is annexed hereto in its entirety:

41 Whole, class C.

Pan-American Lottery Co.

Capital prize, $32,000.

Draws monthly at Ascuncion, Paraguay.

Will draw on Wednesday, March 15th, 1899.

1530. [1523.]* This whole ticket entitles the holder thereof to the whole of such prize as may be drawn by its number in the within-named drawing if presented before the expiration of three months from the date of said drawing.

Four, cipher, five, one, seven.
[One, five, five, eight, cipher.]*
[15580.]*
40517.

Two dollars.

ENRIQUE MONTES DE LEON, *Manager.*
FERNANDO LOPEZ, *Intervenor.*

(Back.)

All genuine tickets are signed by Enrique Montes de Leon, manager, and Barnardo Lopez, intervenor, and will not hold good if mutilated, pierced, or in any way altered from the original.

*List of Prizes.*

| | | |
|---|---|---|
| 1 prize | $32,000 | $32,000 |
| 1 prize | 15,000 | 15,000 |
| 1 prize | 5,000 | 5,000 |
| 1 prize | 2,000 | 2,000 |
| 3 prizes | 500 | 1,500 |
| 10 prizes | 200 | 2,000 |
| 20 prizes | 100 | 2,000 |
| 100 prizes | 50 | 5,000 |
| 200 prizes | 30 | 6,000 |
| 300 prizes | 20 | 6,000 |
| 500 | 10 | 5,000 |

*Approximation Prizes.*

| | | |
|---|---|---|
| 150 prizes | $20 | $3,000 |
| 150 prizes | 10 | 1,500 |
| 150 prizes | 8 | 1,200 |
| 150 prizes | 8 | 1,200 |

[* Words and figures enclosed in brackets erased in copy.]

*Terminals.*

| | | |
|---|---|---|
| 999 prizes | $10 | $9,990 |
| 999 prizes | 10 | 9,990 |
| 42 | | |
| 999 prizes | 4 | 3,996 |
| 999 prizes | 4 | 3,996 |
| 5,733 prizes, amounting to | | $116,372 |

We personally supervise all drawings of the Pan-American lottery, and our signatures witness that we guarantee the perfect fairness of said drawings.

ENRIQUE MONTES DE LEON, *Manager.*
FERNANDO LOPEZ, *Intervenor.*

*Certificate.*

Since September, 1893, I have paid as presented, without delay or discount, all prizes drawn in the Pan-American lottery, and I certify that the Pan-American Lottery Company has placed in my charge an amount of money amply sufficient to guarantee the payment of all prizes which may be drawn in the Pan-American lottery, and that said prizes will be paid upon presentation to me or to any of the general State agents representing the Pan-American lottery in the United States.

The general State agents will keep deposits with the following national banks:

Equitable national bank, Cincinnati, Ohio.
Third national bank, St. Louis, Mo.
City national bank, Dallas, Texas.
National Bank of Commerce, Omaha, Nebraska.
Franklin national bank, New York.
First National Bank of San Francisco, California.

J. C. BOCA,
*General Agent for the United States.*

43 and the other said whole tickets being like the one hereto annexed in all particulars except that it differs in numbers; also six half tickets of said purported Pan-American Lottery Company, one of which is hereto annexed in its entirety, for the reason that the grand jurors are unable to accurately describe the same because of the printing and cuts thereon contained, the other five of said half tickets being in kind like unto the one hereto attached in its entirety and made a part hereof:

44

Half, class C.

Pan-American Lottery Co.

Capital prize, $32,000.

Draws monthly at Ascuncion, Paraguay.

Will draw on Wednesday, March 15th, 1899.

2477. [2411.]*

This half ticket entitles the holder thereof to the half of such prize as may be drawn by its number in the within-named drawing if presented before the expiration of three months from the date of said drawing.

One, four, cipher, four, one.
Three, [six, four, four, five.]*
[36445.]*
14041.

One dollar.

ENRIQUE MONTES DE LEON, *Manager.*
FERNANDO LOPEZ, *Intervenor.*

(Back.)

All genuine tickets are signed by Enrique Montes de Leon, manager, and Barnardo Lopez, intervenor, and will not hold good if mutilated, pierced, or in any way altered from the original.

*List of Prizes.*

| | | |
|---|---|---|
| 1 prize | $32,000 | $32,000 |
| 1 prize | 15,000 | 15,000 |
| 1 prize | 5,000 | 5,000 |
| 1 prize | 2,000 | 2,000 |
| 3 prizes | 500 | 1,500 |
| 10 prizes | 200 | 2,000 |
| 20 prizes | 100 | 2,000 |
| 100 prizes | 50 | 5,000 |
| 200 prizes | 30 | 6,000 |
| 300 prizes | 20 | 6,000 |
| 500 | 10 | 5,000 |

*Approximation Prizes.*

| | | |
|---|---|---|
| 150 prizes | $20 | $3,000 |
| 150 prizes | 10 | 1,500 |
| 150 prizes | 8 | 1,200 |
| 150 prizes | 8 | 1,200 |

*Terminals.*

| | | |
|---|---|---|
| 999 prizes | $10 | $9,990 |
| 999 prizes | 10 | 9,990 |

45

| | | |
|---|---|---|
| 999 prizes | 4 | 3,996 |
| 999 prizes | 4 | 3,996 |
| 5,733 prizes, amounting to | | $116,372 |

[* Words and figures enclosed in brackets erased in copy.]

We personally supervise all drawings of the Pan-American lottery, and our signatures witness that we guarantee the perfect fairness of said drawings.

ENRIQUE MONTES DE LEON, *Manager.*
FERNANDO LOPEZ, *Intervenor.*

*Certificate.*

Since September, 1893, I have paid as presented, without delay or discount, all prizes drawn in the Pan-American lottery, and I certify that the Pan-American Lottery Company has placed in my charge an amount of money amply sufficient to guarantee the payment of all prizes which may be drawn in the Pan-American lottery, and that said prizes will be paid upon presentation to me or to any of the general State agents representing the Pan-American lottery in the United States.

The general State agents will keep deposits with the following nationals banks:

Equitable national bank, Cincinnati, Ohio.
Third national bank, St. Louis, Mo.
City national bank, Dallas, Texas.
National Bank of Commerce, Omaha, Nebraska.
Franklin national bank, New York.
First National Bank of San Francisco, California.

J. C. BOCA,
*General Agent for the United States.*

46 differing only in numbers; also ten quarter tickets of said purported Pan-American Lottery Company, one of which is hereto annexed in its entirety, because of the printing and cuts thereon it would be impossible and improper for the grand jurors to fully set out the same otherwise, the other nine tickets being like unto the one hereto annexed in its entirety and made a part hereof:

47 Quarter, class C.

Pan-American Lottery Co.

Capital prize, $32,000.

Draws monthly at Ascuncion, Paraguay.

Will draw on Wednesday, March 15th, 1899.

This quarter ticket entitles the holder thereof to the quarter of such prize as may be drawn by its number in the within-named drawing if presented before the expiration of three months from the date of said drawing.

Five, cipher, nine, two, one.
[Five, three, four, two, cipher.]*
[54320.]*
50921.

4455.
[4161.]*

50 cents.

ENRIQUE MONTES DE LEON, *Manager.*
FERNANDO LOPEZ, *Intervenor.*

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[* Words and figures enclosed in brackets erased in copy.]

(Back.)

All genuine tickets are signed by Enrique Montes de Leon, manager, and Barnardo Lopez, intervenor, and will not hold good if mutilated, pierced, or in any way altered from the original.

*List of Prizes.*

| | | |
|---|---|---|
| 1 prize | $32,000 | $32,000 |
| 1 prize | 15,000 | 15,000 |
| 1 prize | 5,000 | 5,000 |
| 1 prize | 2,000 | 2,000 |
| 3 prizes | 500 | 1,500 |
| 10 prizes | 200 | 2,000 |
| 20 prizes | 100 | 2,000 |
| 100 prizes | 50 | 5,000 |
| 200 prizes | 30 | 6,000 |
| 300 prizes | 20 | 6,000 |
| 500 | 10 | 5,000 |

*Approximation Prizes.*

| | | |
|---|---|---|
| 150 prizes | $20 | $3,000 |
| 150 prizes | 10 | 1,500 |
| 150 prizes | 8 | 1,200 |
| 150 prizes | 8 | 1,200 |

*Terminals.*

| | | |
|---|---|---|
| 999 prizes | $10 | $9,990 |
| 999 prizes | 10 | 9,990 |
| 48 | | |
| 999 prizes | 4 | 3,996 |
| 999 prizes | 4 | 3,996 |
| 5,633 prizes, amounting to | | $116,372 |

We personally supervise all drawings of the Pan-American lottery, and our signatures witness that we guarantee the perfect fairness of said drawings.

ENRIQUE MONTES DE LEON, *Manager.*
FERNANDO LOPEZ, *Intervenor.*

*Certificate.*

Since September, 1893, I have paid as presented, without delay or discount, all prizes drawn in the Pan-American lottery, and I certify that the Pan-American Lottery Company has placed in my charge an amount of money amply sufficient to guarantee the payment of all prizes which may be drawn in the Pan-American lottery, and that said prizes will be paid upon presentation to me or to any of the general State agents representing the Pan-American lottery in the United States.

The general State agents will keep deposits with the following nationals banks:

Equitable national bank, Cincinnati, Ohio.
Third national bank, St. Louis, Mo.
City national bank, Dallas, Texas.
National Bank of Commerce, Omaha, Nebraska.
Franklin national bank, New York.
First National Bank of San Francisco, California.

J. C. BOCA,
*General Agent for the United States.*

49 differing only in numbers; also twenty tickets denominated eighths of said purported Pan-American Lottery Company, one of which is annexed hereto in its entirety and made a party of this indictment, because the grand jurors are unable to accurately describe the same by reason of the great amount of printed matter and cuts thereon contained, the other nineteen of such eighths tickets being like unto the one hereto attached and annexed in its entirety and made a part hereof:

50 Eighth, class C.

Pan-American Lottery Co.

Capital prize, $32,000.

Draws monthly at Ascuncion, Paraguay.

Will draw on Wednesday, March 15th, 1899.

5339. [5319.]*

This eighth ticket entitles the holder thereof to the eighth of such prize as may be drawn by its number in the within-named drawing if presented before the expiration of three months from the date of said drawing.

Five, one, eight, cipher, five.
[Five, one, seven, eight, five.]*
[51785.]*
51805.

25 cents.

ENRIQUE MONTES DE LEON, *Manager.*
FERNANDO LOPEZ, *Intervenor.*

(Back.)

All genuine tickets are signed by Enrique Montes de Leon, manager, and Barnardo Lopez, intervenor, and will not hold good if mutilated, pierced, or in any way altered from the original.

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[* Words and figures enclosed in brackets erased in copy.]

*List of Prizes.*

| | | |
|---|---|---|
| 1 prize | $32,000 | $32,000 |
| 1 prize | 15,000 | 15,000 |
| 1 prize | 5,000 | 5,000 |
| 1 prize | 2,000 | 2,000 |
| 3 prizes | 500 | 1,500 |
| 10 prizes | 200 | 2,000 |
| 20 prizes | 100 | 2,000 |
| 100 prizes | 50 | 5,000 |
| 200 prizes | 30 | 6,000 |
| 300 prizes | 20 | 6,000 |
| 500 | 10 | 5,000 |

*Approximation Prizes.*

| | | |
|---|---|---|
| 150 prizes | $20 | $3,000 |
| 150 prizes | 10 | 1,500 |
| 150 prizes | 8 | 1,200 |
| 150 prizes | 8 | 1,200 |

*Terminals.*

| | | |
|---|---|---|
| 999 prizes | $10 | $9,990 |
| 999 prizes | 10 | 9,990 |
| 51 | | |
| 999 prizes | 4 | 3,996 |
| 999 prizes | 4 | 3,996 |
| 5,733 prizes, amounting to | | $116,372 |

We personally supervise all drawings of the Pan-American lottery, and our signatures witness that we guarantee the perfect fairness of said drawings.

ENRIQUE MONTES DE LEON, *Manager.*
FERNANDO LOPEZ, *Intervenor.*

*Certificate.*

Since September, 1893, I have paid as presented, without delay or discount, all prizes drawn in the Pan-American lottery, and I certify that the Pan-American Lottery Company has placed in my charge an amount of money amply sufficient to guarantee the payment of all prizes which may be drawn in the Pan-American lottery, and that said prizes will be paid upon presentation to me or to any of the general State agents representing the Pan-American lottery in the United States.

The general State agents will keep deposits with the following national banks:

Equitable national bank, Cincinnati, Ohio.
Third national bank, St. Louis, Mo.
City national bank, Dallas, Texas.

National Bank of Commerce, Omaha, Nebraska.
Franklin national bank, New York.
First National Bank of San Francisco, California.

J. C. BOCA,
*General Agent for the United States.*

52 differing only in numbers, and said box so containing the said certificates or tickets being addressed and consigned by the said C. F. Champion, alias W. W. Ogden, W. F. Champion, and Charles B. Park to Livingston & Blosser, 2477 Washington avenue, Ogden, Utah, which was so addressed and so deposited with the said express company for the purpose of being carried from Dallas, in the State of Texas, to Ogden, in the State of Utah, and there delivered to Livingston & Blosser for the purpose of disposing of such above-mentioned lottery tickets, and which said tickets—wholes, halves, quarters, and eighths—purported upon their face to entitle the holder thereof to so much of said prize of thirty-two thousand dollars as the denomination of such ticket might be entitled to in the event the number upon such ticket at said drawing, which purported to take place on Wednesday, March 15th, 1899, should be allotted the prize or any part thereof, according to lot or chance, the peculiar and particular manner of which is to the grand jurors unknown, all of which the said C. F. Champion, alias W. W. Ogden, W. F. Champion, and Charles B. Park then and there well knew, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

G. J. GIBBS,
*Foreman of the Grand Jury.*

Endorsed as follows: No. 519. United States *vs.* C. F. Champion *et al.* Violation of art. 5440. Indictment. A true bill. G. J. Gibbs, foreman. Presented and filed in open court this April 13th, A. D. 1899. J. H. Finks, clerk. Wm. H. Atwell, United States attorney.

53 *Authentication of Record.*

District Court of the United States, Northern District of Texas.

I, J. H. Finks, clerk of said court, do hereby certify that the foregoing attached nine pages of printing and writing are true, correct, and complete copies of the original on file and remaining of record in the clerk's office of said court.

In witness whereof I have hereunto set my hand and the seal of said district court at Dallas, Texas, the 12th day of June, 1899.

J. H. FINKS, *Clerk*,
By CHAS. H. LEDNUM, *Deputy*.

{Seal of the United States District Court, Dallas, Northern District Texas.}

UNITED STATES OF AMERICA, }
*Northern District of Texas.* }

I, Edward R. Meek, United States district judge for the northern district of Texas, do hereby certify that J. H. Finks, clerk, whose genuine signature is affixed to the foregoing certificate by his deputy, Chas. H. Lednum, is and was at the time of affixing his signature thereto clerk of the district court of the United States in and for the northern district of Texas, duly appointed and qualified, and that Chas. H. Lednum, whose genuine signature is affixed to the foregoing certificate, is the duly appointed and qualified deputy clerk of the said J. H. Finks, clerk, as aforesaid; that his acts and attestations and the acts and attestations of each, given as such clerk or clerk by deputy, are entitled to full effect and credit, and that his certificate is in due form of law.

In witness whereof I have hereunto set my hand this 12th day of June, 1899.

EDWARD R. MEEK,
*United States District Judge for the Northern District of Texas.*

I, J. H. Finks, clerk of said court, do hereby certify that the Honorable Edward R. Meek, whose signature is subscribed to the foregoing certificate, was at the time of signing and attesting the same United States district judge for the northern district of Texas, duly commissioned and qualified.

J. H. FINKS, *Clerk*,
By CHAS. H. LEDNUM, *Deputy*.

{ Seal of the United States District Court, Dallas, Northern District Texas. }

(Endorsed:) Filed June 22, 1899. S. W. Burnham, clerk.

54 EXHIBIT E.

*Transcript of Record.*

In the United States Circuit Court of Appeals for the Seventh Circuit.

In the Matter of the Petition of C. F. CHAMPION for a Writ of *Habeas Corpus.*

UNITED STATES OF AMERICA, Appellant,
*vs.*
C. F. CHAMPION, Appellee. } No. 585.

Mr. S. H. Bethea, United States district attorney, counsel for appellant.
Mr. Joseph B. David, counsel for appellee.

Appeal from the circuit court of the United States, northern district of Illinois, northern division.

Transcript of record filed April 12, 1899. Printed record.

55 In the United States Circuit Court of Appeals for the Seventh Circuit.

In the Matter of the Petition of C. F. CHAMPION for a Writ of *Habeas Corpus.*

UNITED STATES OF AMERICA, Appellant,
*vs.*
C. F. CHAMPION, Appellee. } No. 585.

Mr. S. H. Bethea, United States district attorney, counsel for appellant.
Mr. Joseph B. David, counsel for appellee.

Appeal from: the circuit court of the United States, northern district of Illinois, northern division.

56 *Pleas.*

Pleas in the circuit court of the United States for the northern district of Illinois, northern division, begun and held at the United States court-room, in the city of Chicago, in said district and division before the Honorable James G. Jenkins, circuit judge of the United States for the seventh judicial circuit, on Thursday, the thirtieth day of March, in the year of our Lord one thousand eight hundred and ninety-nine, being one of the regular days of the December term of said court, 1898, and of our Independence the one hundred and twenty-third year.

S. W. BURNHAM, *Clerk.*

57 In the Matter of the Petition of C. F. CHAMPION for a Writ of *Habeas Corpus*. 25119. Petition.

Be it remembered that on this day to wit, the twenty-second day of March, 1899, came C. F. Champion by his attorney and filed in the clerk's office of said court a certain petition for writ of *habeas corpus* and also for a writ of certiorari, which said petition is in words and figures following to wit:

*Petition for Writ of Habeas Corpus and Certiorari. Filed M'ch* 22, 1899.

Petition for writ of *habeas corpus* and certiorari.

UNITED STATES OF AMERICA, } ss:
*State of Illinois,* }

In the Circuit Court of the United States, Northern Division of Illinois.

To the Honorable James G. Jenkins, one of the judges of said court:

The petitioner, C. F. Champion, a resident and citizen of the city of Chicago, county of Cook and State of Illinois, respectfully shows unto your honor that he is now detained and restrained of his liberty by John C. Ames, United States marshal for the northern district of Illinois, by virtue of a certain warrant of removal issued by the Honorable Christian C. Kohlsaat, judge of the United States district court for the northern district of Illinois, a copy of which said warrant of removal is hereto attached and marked "Exhibit A" and made a part hereof.

This petitioner further shows that said warrant of removal was issued by the said Christian C. Kohlsaat, said judge, on the 21st day of March, A. D. 1899, upon oral motion of the United States district attorney for said northern district of Illinois, made in open court and which motion was based solely upon a certain warrant of commitment of this petitioner C. F. Champion, issued on the 21st day of March, A. D. 1899, by Lewis F. Mason, United States commissioner in and for said northern district of Illinois, a copy of which said warrant of commitment is hereto attached, marked "Exhibit B" and made a part hereof.

Your petitioner further represents that said warrant of removal issued after objection by said C. F. Champion had been
57½ made in open court by and through his attorney, and that upon the conclusion of the hearing of said objections the said judge refused to permit or entertain any appeal from the granting of said warrant of removal, though requested by this petitioner to permit such appeal to the United States circuit court of appeals in and for the seventh district thereof, and the said judge of said northern district of Illinois refused to permit the filing of any objections or the entertaining of any motion of record, solely upon the ground that his act in the premises of issuing the warrant was

not a matter of record and refused to entertain any motion or any order of record, and the said judge refused to enter any order admitting this petitioner to bail.

And your petitioner further represents that said warrant of commitment issued by the said Lewis F. Mason, said United States commissioner as aforesaid was issued solely and by virtue of the following:

First. A copy of the original complaint made before Charles H. Lednum, Esquire, a United States commissioner for the northern district of Texas, a copy of which was filed with said Lewis F. Mason, United States commissioner aforesaid, on the 3rd day of March, A. D. 1899, a copy of which said complaint is hereto attached and marked "Exhibit C" and made a part hereof.

Second. A warrant for the arrest and apprehension of the said C. F. Champion issued by the said Lewis F. Mason, said United States commissioner, by reason of the filing before him of said complaint referred to herein as Exhibit C, a copy of which said warrant is also attached hereto and marked "Exhibit D" and made a part hereof, and upon which said warrant this petitioner was apprehended and arrested by the said United States marshal of the northern district of Illinois and brought before the said Lewis F. Mason, said United States commissioner, for the examination touching the charges in said complaint heretofore referred to as Exhibit C.

This petitioner further says that this petitioner stands ready to produce before this honorable court the original said warrant now in the hands of the said United States marshal of the northern district of Illinois.

Third. An amended complaint filed before said United States commissioner, Lewis F. Mason, on the 14th day of March, A. D. 1899, a copy of which said amended complaint is also hereto attached and marked "Exhibit E" and made a part hereof.

Fourth. Certain testimony and evidence introduced before said Lewis F. Mason, said United States commissioner, upon the examination of this petitioner touching his probable guilt of the
57½ charges alleged against him in said amended complaint (the United States of America by and through its attorney in and for the northern district of Illinois having before said commissioner abandoned the complaint first herein mentioned and referred to as Exhibit C) a complete transcript of the testimony and evidence heard before said United States commissioner, Lewis F. Mason, touching the charges in said amended complaint, a copy of each of certain exhibits before the said United States commissioner, Lewis F. Mason, on said hearing is also hereto attached and marked "Exhibit F" and made a part hereof; said exhibits introduced on the hearing before said commissioner which are hereto respectively marked Exhibits 1, 2, 3, 4, 5, 6, 7, the original of all of said exhibits being now in the possession and custody of the United States attorney in and for the northern district of Illinois, which this petitioner stands ready to produce before this honorable court upon the hearing of this petition.

This petitioner further shows unto this honorable court that his detention upon said warrant of removal or upon said warrant of commitment by said United States marshal is unjust and contrary to law.

First. Because said Lewis F. Mason, said United States commissioner was without authority of law to issue any warrant for the arrest of this petitioner, C. F. Champion, based upon the complaint filed before him the said United States commissioner and referred to herein as Exhibit C, and in issuing said warrant exceeded his jurisdiction since the procedure in the issuance of said warrant on said complaint was not in accordance with the Constitution of the United States of America, and the laws thereof.

Second. Said warrant for the arrest of this petitioner based upon said complaint is vague, uncertain and is not sufficient under the Constitution and laws of the United States of America.

Third. Said warrant of commitment of this petitioner issued by said Lewis F. Mason, said United States commissioner upon which said warrant of removal was issued is void, and was issued without authority of law, because the said amended complaint mentioned and referred to herein and attached hereto as Exhibit E, is not in accordance with the Constitution and laws of the United States, as it does not appear by said amended complaint that the matters alleged in said amended complaint were made from facts within the knowledge of said complainant or upon credible information and belief, and said amended complaint was insufficient to authorize the said United States commissioner, Lewis F. Mason, to conduct
58 any examination of this petitioner, C. F. Champion, touching the probable guilt of the said petitioner of the offense in said amended complaint alleged, and all proceedings before him, the said United States commissioner, Lewis F. Mason, by virtue of which this petitioner was committed to the custody of said United States marshal were void.

Fourth. Said warrant of commitment issued by the said Lewis F. Mason, said United States commissioner, was void by reason of the fact that said complaint and said amended complaint were each respectively insufficient and uncertain and did not charge according to the law the violation of any crime or offense against the United States of America, as is required by law.

Fifth. Said Lewis F. Mason, said United States commissioner, exceeded his jurisdiction in issuing said warrant of commitment because there was not sufficient testimony heard by him, the said commissioner, upon the examination of this petitioner, C. F. Champion, touching the matters in said amended complaint alleged showing or tending to show that there was probable cause for believing that this petitioner, C. F. Champion, was guilty of the offense alleged in said amended complaint.

Sixth. Said Lewis F. Mason, said United States commissioner was without jurisdiction in the issuing of said warrant of commitment of this petitioner, C. F. Champion, and in issuing the same exceeded his jurisdiction, because there was no testimony or evidence heard before him, the said commissioner showing or tending

to show that the said C. F. Champion was guilty of any crime or offence against the United States of America, or that there was any probable cause to believe that he was guilty of any offence or crime alleged to have been committed by him the said C. F. Champion as charged in the said complaint or amended complaint.

Seventh. Said Lewis F. Mason, said United States commissioner, was without jurisdiction to issue the said warrant of commitment and exceeded his jurisdiction in issuing the same because it fully appeared before him, the said United States commissioner that at the time the offence — alleged to have been committed within the jurisdiction of the northern district of Texas as charged in said complaint and said amended complaint, that he, the said C. F. Champion, was not at or in Dallas, Texas, nor within the jurisdiction of said northern district of Texas, but that he, the said C. F. Champion, was in the city of Chicago, county of Cook and State of Illinois and within the jurisdiction of the northern district of Illinois, and that he, the said C. F. Champion, did not aid, abet, assist, advise, counsel or encourage nor cause any other person or persons to commit or aid in the commission or perpetration of any crime or offence against the United States of America, nor any crime or offence as charged in either the said complaint or amended complaint.

58½ Eighth. That all proceedings before said commissioner were void because the statute alleged in said amended complaint as having been violated by the said C. F. Champion, was and is null and void and of no effect because the same was passed contrary to the Constitution of the United States and the same was and is unconstitutional, and in passing the same the Congress of the United States exceeded its authority.

Ninth. The said warrant of removal issued by the said Christian C. Kohlsaat of the United States district court for the northern district of Illinois, is not sufficient in law as the same is vague, uncertain and indefinite, and does not show upon its face sufficient jurisdiction in the said judge of the district court in issuing the same and because the statute alleged to have been violated by this petitioner, as set forth in said warrant of removal was and is unconstitutional and void.

And this petitioner shows that all the testimony which was heard by the said Lewis F. Macon, said United States commissioner, and the examination of this petitioner, C. F. Champion, touching the matters charged in said amended complaint was presented to the said Christian C. Kohlsaat, said district judge, and it fully appeared before him, the said judge, that this petitioner was not and could not be guilty of the offence alleged against him in said amended complaint for which said warrant of removal was issued.

Your petitioner further says that he is not restrained of his liberty by the said John C. Ames, United States marshal by any other process of any kind or character, except as hereinbefore set forth, and this petitioner fears that unless restrained by the order of this honorable court the said John C. Ames said United States marshal in and for the northern district of Illinois will forthwith proceed

to execute said warrant of removal and take this petitioner from the jurisdiction of this court and from the northern district of Illinois and to the northern district of Texas.

Your petitioner further shows and states upon credible information and belief which he believes to be true, that no warrant for the apprehension and arrest of this petitioner was issued by the said Charles H. Lednum, United States commissioner for the northern district of Texas based upon the complaint filed before him, and your petitioner states the fact to be that no United States grand jury has been in session in and for the northern district of Texas since the date upon which it is alleged in either the said complaint or amended complaint hereto attached said alleged offense was committed by petitioner, and that no indictment is now pending in the United States court in and for the northern district of Texas nor in any other court of the United States of America
59 charging this petitioner with the violation of any law, or of any offence, crime or misdemeanor against the United States of America.

Your petitioner further shows that he is innocent of the crime or offence alleged against him in said complaint and said amended complaint and upon the hearing of the matter before this honorable court his innocence in the premises will be made manifest.

Your petitioner further shows that it will be necessary for this honorable court to have before him all the proceedings before the said United States commissioner, said Lewis F. Mason, in the premises.

Your petitioner therefore prays that a writ of *habeas corpus* forthwith issue by order of this honorable court pursuant to the Constitution of the United States of America, and the laws thereof commanding the said John C. Ames, said United States marshal forthwith to produce before your honor the body of this petitioner, C. F. Champion, so that the cause and legality of his detention may be inquired into and that upon the hearing of this petition this petitioner may be discharged from the custody of said John C. Ames, said United States marshal of the northern district of Illinois.

This petitioner prays that a writ of certiorari issue pursuant to law in aid of the writ of *habeas corpus* forthwith commanding the said Lewis F. Mason, said United States commissioner to bring before your honor all records and proceedings before him the said Lewis F. Mason, said United States commissioner, touching the arrest, apprehension, examination and commitment of this petitioner in the premises as hereinbefore set forth.

And your petitioner will ever pray, etc.

C. F. CHAMPION.

JOSEPH B. DAVID,
*Att'y for Petitioner.*

UNITED STATES OF AMERICA,
*State of Illinois, Northern District of Illinois,* } ss:
*County of Cook,*

Before me, S. W. Burnham, clerk, personally appeared C. F. Champion, the foregoing petitioner, well known to me to be the same person whose name is subscribed to the foregoing petition and who being first duly sworn on oath says that he has read the foregoing petition by him subscribed and that he knows the contents thereof, and that the same is true in substance and in fact.

C. F. CHAMPION.

59½ Subscribed and sworn to before me, this 22nd day of March, A. D. 1899.

S. W. BURNHAM,
*Clerk U. S. Circuit Court, Nor. Dist. of Ill.*

(Endorsed:) Filed Mar. 22, 1899. S. W. Burnham, clerk.

EXHIBIT A.

*Warrant of Removal.*

EXHIBIT "A."

C. C. Kohlsaat, judge of the district court of the United States of America for the northern district of Illinois, to the marshal of the same district, Greeting:

Whereas, C. F. Champion has been committed to jail under and by virtue of a commitment made by an United States commissioner for this district, a copy of which commitment is hereto annexed; and the United States attorney for this district has made application to me for a warrant for the removal of the said prisoner under the provisions of section 1014 of the Revised Statutes, to the northern district of Texas, in which district the offence for which he has been so committed is to be tried and the said prisoner has been brought before me, and due examination of the matter has been made.

Therefore you are hereby commanded, in the name and by the authority of the said United States, that you forthwith remove the said prisoner, now in your custody, to the said northern district of Texas and there deliver him to the marshall of that district, in order that the said prisoner may be dealt with according to law.

Given under my hand and the seal of the said district court at Chicago, in the said northern district of Illinois, this 21st day of March, A. D. 1899, and of the Independence of the United States the 123d year.

(Signed) C. C. KOHLSAAT,
[SEAL.] *District Judge.*

Attest:
(Signed) T. C. MACMILLAN, *Clerk.*

(Endorsed:) Filed Mar. 22, 1899. S. W. Burnham, clerk.

60 EXHIBIT B.

*Warrant of Commitment.*

EXHIBIT "B."

The President of the United States of America to the marshal of the northern district of Illinois and to the keeper of the common jail, of the county of Cook, in said district, Greeting:

Whereas, C. F. Champion has been apprehended and brought before the undersigned, Lewis F. Mason, a United States commissioner for the district aforesaid, for examination, by virtue of a warrant of the said commissioner issued upon complaint made before him in writing, on oath, charging the said C. F. Champion with transporting lottery tickets, etc.

And whereas, on such examination there appears probable cause to believe the said C. F. Champion guilty of the said offense, and the undersigned, commissioner as aforesaid, has ordered the said C. F. Champion to enter into recognizance, with sufficient surety, in the sum of $1,000.00 (dollars) for his appearance for trial on the said charge at the May term of the district court of the United States for the northern district of Texas, or in default thereof to be committed to jail; and whereas, the said C. F. Champion has not offered such recognizance; now, therefore, you the said marshal, are hereby commanded that you convey the said C. F. Champion to the said jail; and you, the said keeper, are hereby commanded that you receive the said C. F. Champion into the said jail, and him there safely keep until he be discharged therefrom by due course of law.

Witness the hand and seal of the said commissioner, at Chicago, aforesaid, in the said division and district, this 21st day of March, A. D. 1899, and of the Independence of the United States the 123 year.

(Signed) LEWIS F. MASON,
[SEAL.] *U. S. Commissioner.*

True copy.
LEWIS F. MASON,
*U. S. Commissioner.*

(Endorsed:) Filed Mar. 22, 1899. S. W. Burnham, clerk.

60½ EXHIBIT C.

*Complaint.*

"EXHIBIT C."

UNITED STATES OF AMERICA, }
*Northern District of Texas.* }

Before me, Charles H. Lednum, a United States commissioner, for the northern district of Texas, personally appeared this day

L. N. Farish, who being by me first duly sworn, deposes and says upon his own knowledge and upon information, received from an official investigation, which he believes to be true and correct that on or about the 20th day of February, A. D. 1899, at Dallas county, Texas, in the northern district of Texas, one W. F. Champion and one C. B. Park, and one C. F. Champion, alias W. W. Ogden, in violation of sections 5440 of the Revised Statutes of the United States, did unlawfully and wilfully conspire together to commit an offense against the United States laws, to wit: did for the purpose of disposing of the same, transport and cause to be transported and did deposit for the purpose of being transported from Dallas in the State of Texas to Fresno in the State of California, one certain box and package of lottery tickets and advertisements and certificates and papers and instruments representing a ticket for a chance and share and interest in and dependent upon the event of a certain lottery called the Pan-American Lottery Company of Paraquay, South America.

Second count. And the said deponent aforesaid further says under oath upon investigation made as aforesaid, that the said W. F. Champion and C. B. Park and C. F. Champion alias W. W. Ogden, did so conspire together to commit an offense against the laws of the United States to wit: an offense against chapter 191, 28th Statutes at Large, 963, and in pursuance of such conspiracy did unlawfully and wilfully further deposit certain boxes and packages addressed to ten other divers and sundry parties domiciled and living outside of the State of Texas but in the United States, and then the said W. F. Champion, and C. B. Park and C. F. Champion, alias W. W. Ogden, did deposit the said boxes and packages with the Wells, Fargo Express Company in Dallas, Texas, to be transported and carried from the State of Texas to the various States and Territories of the United States indicated on the said boxes and packages, and the said boxes and packages containing papers, certificates and instruments purporting to be and representing tickets, chances shares and interests in and dependent upon the event of a lottery, to wit: the Pan-American Lottery Company of
61 Paraquay, South America, which was then and there offering prizes dependent upon lot and chance and the said conspiracy aforesaid, against the laws of the United States was that the said lottery ticket so transported and carried should be disposed of contrary to the form of statutes in such case made and provided and against the peace and dignity of the United States, and the said W. F. Champion, C. B. Park and C. F. Champion alias W. W. Ogden, are now in the northern district of Texas.

Deponent further says that he has reason to believe and does believe that E. T. Stokes, El Paso; agent of the Wells Fargo Express Co., Dallas; Richard Rule, Deming, New Mexico, and Richard Hudson, Deming, New Mexico, are material witnesses to the subject-matter in this complaint.

(Signed) L. H. FARISH.

Sworn to before me and subscribed in my presence this 28th day of February, A. D. 1899.

CHARLES H. LEDNUM.
*U. S. Commissioner for the Northern District of Texas.*

I approve this prosecution and the United States commissioner C. H. Lednum will issue warrants for arrest of parties.

WM. H. ATWELL, *U. S. Att'y.*

The foregoing has the following endorsement, to wit:
United States district court. The United States of America *vs.* W. F. Champion *et al.* Affidavit. Filed February 28, 1899. Charles H. Lednum, U. S. commissioner.

I hereby certify that the foregoing is a true copy of the original thereof now in my office.
March 1st, 1899.
Attest:
[U. S. Commissioner Seal.]

CHARLES H. LEDNUM,
*United States Commissioner.*

I hereby certify that the foregoing is a true copy of a copy of an original complaint filed in my office this day.
March 3rd, 1899.
Attest:
[U. S. Commissioner Seal].

LEWIS F. MASON,
*U. S. Commissioner.*

(Endorsed:) Filed Mar. 22, 1899. S. W. Burnham, clerk.

61½ EXHIBIT D.

*Warrant for Arrest, etc.*

EXHIBIT "D."

The President of the United States of America to the marshal of the northern district of Illinois:

Whereas, complaint in writing, on oath, has been made to the undersigned, Lewis F. Mason, a United States commissioner for the district aforesaid, charging that W. F. Champion, C. B. Park and C. F. Champion, alias W. W. Ogden, on or about the 20th day of February, A. D. 1899, at Dallas, Dallas county, within the northern division of the northern district of Texas, did violate the postal laws of the United States, to wit, section 5440 of the Revised Statutes of the United States, — unlawfully and wilfully compromise together to commit an offense against the laws of the United States, to wit, did transport lottery tickets.

Now, therefore, you are hereby commanded that you take the said W. F. Champion, C. B. Park and C. F. Champion, alias W. W. Ogden (if they be found within your said district), and them safely

keep, so that you have their bodies forthwith before the undersigned, commissioner as aforesaid, at his office in Chicago, in the said district (or in case of his absence, or inability to act, before any other United States commissioner or judicial officer having jurisdiction), in order that the said W. F. Champion, C. B. Park, C. F. Champion, alias W. W. Ogden, may be dealt with according to law. And have you then there this writ, with a return of your doings hereon.

Witness the hand and seal of the said commissioner, at Chicago aforesaid, this 3rd day of March, A. D. one thousand eight hundred and ninety-nine and of the Independence of the said United States the 123 year.

[U. S. Commissioner Seal.]

(Signed) LEWIS F. MASON,
*U. S. Commissioner.*

I, Lewis F. Mason, do hereby certify that the above is a true copy of the warrant issued by me on the 3rd day of March in the case U. S. *vs.* W. F. Champion *et al.*

(Signed) LEWIS F. MASON,
*U. S. Commissioner.*

(Endorsed:) Filed Mar. 22, 1899. S. W. Burnham, clerk.

62 EXHIBIT E.

*Amended Complaint.*

EXHIBIT "E."

THE UNITED STATES OF AMERICA,
*Seventh Circuit, Northern District of Illinois, Northern Division,* } *sct:*

On this fourteenth day of March A. D. 1899, at the city of Chicago, in the northern division of the northern district of Illinois, before Lewis F. Mason, a commissioner of the said United States for the said district comes Richard Hudson, of the city of Deming, New Mexico, and upon his oath complains and says that C. F. Champion, late of the city of Dallas, in the northern district of Texas, on or about the 15th day of February, A. D. 1899, at Dallas aforesaid, in the district last aforesaid, unlawfully did cause to be carried and transferred by the Wells-Fargo Express Company from the State of Texas to the Territory of New Mexico, divers tickets in and advertisements of a lottery, to wit: a lottery in the same tickets and advertisements called the Pan-American lottery and therein described as a lottery then being conducted by the Pan-American Lottery Company with drawings monthly at Asuncion, Paraquay, that is to say one package containing such lottery tickets and advertisements directed to one Samuel Abraham, at Clifton, Arizona Territory, another package containing such tickets and advertisements directed

to S. H. Benson at Wilcox, Arizona Territory, another package containing such tickets and advertisements directed to Paul S. Migel, at San Bernardino, California, and another package containing such tickets and advertisements directed to James A. Ward, at Fresno, California, contrary to the forms of the statutes of the said United States, in such case made and provided, viz: section 1, act of March 2nd, 1895, 2 suppl. R. S. U. S., 435.

Therefore said complainant prays that said C. F. Champion may be apprehended and further dealt with according to law.

(Signed) RICHARD HUDSON.

Subscribed and sworn before me by the above-named Richard Hudson, the day and year first above written.

(Signed) LEWIS F. MASON,
*Commissioner.*

Approved:
[SEAL.]

____ ____,
*U. S. Att'y N. Dist. Ill.*

62½ (Endorsement:) Northern district of Illinois, northern division, before Lewis F. Mason, U. S. commissioner. United States of America *vs.* C. F. Champion. Amended complaint for violation of act March 2, 1895, chapter 191, pg. 435, vol. 2, R. S. of U. S. Filed March 14, 1899. Lewis F. Mason, U. S. commissioner.

UNITED STATES OF AMERICA, *Northern District of Illinois,* } *sct:*

I, Lewis F. Mason, United States commissioner, do hereby certify that the within is a true copy of the amended complaint filed before me on the 14th day of March, 1899, in the case of The United States *vs.* C. F. Champion.

(Signed) LEWIS F. MASON,
[SEAL.] *U. S. Commissioner.*

Dated this 15th day of March A. D. 1899.

(Endorsed:) Filed Mar. 22, 1899. S. W. Burnham, clerk.

## EXHIBIT F.

*Testimony of Thomas H. Nesmith.*

### EXHIBIT "F."

THE UNITED STATES OF AMERICA
*vs.*
W. F. CHAMPION, C. B. PARK, and C. F. CHAMPION, alias W. W. Ogden.

Preliminary hearing before United States Commissioner Mason, March 14th, 1899, at 10 o'clock a. m.

Clark J. Tisdel, Esq., appearing for the Government.
Joseph B. David, Esq., appearing for the defendant, C. F. Champion.

THOMAS H. NESMITH, called as a witness on behalf of the prosecution, having been first duly sworn, was examined in chief by Mr. Tisdel, and testified as follows:

Q. What is your name?
A. Thomas H. Nesmith.
Q. What is your business?
A. Mail-carrier.
63 Q. Where?
A. At Dallas, Texas.
Q. How long have you been a mail-carrier at Dallas, Texas?
A. About eight and a half years.
Q. Did you ever see the defendant, Mr. C. F. Champion before?
A. Very often.
Q. When did you first see him?
A. Well, I couldn't say positively.
Q. Well, about how many years ago?
A. I should say it was near four years ago.
Q. Do you recollect your first meeting with him?
A. No, I think not.
Q. What is the first conversation that you recollect of having with Mr. Champion? Do you recollect when you had a conversation with Mr. Champion?
A. No, I don't—I don't know just what the conversation was.
Q. Do you know Mr. W. W. Ogden, of Dallas, Texas?
A. No, sir.
Q. Did you ever hear of him?
A. I have heard of such a party.
Q. Where did you hear about him, and when? Was Mr. Champion present?
A. Yes, sir.
Q. Go on and tell what the conversation was?
A. I received an order through the post-office to deliver——

Mr. DAVID: I object to that.

Mr. TISDEL: Are you talking now about Ogden or Champion?

A. I had reference to Mr. Champion's mail.

Q. Never mind that. I am asking what talk you had with Mr. Champion about Mr. Ogden?

A. I received certain mail addressed W. W. Ogden, 385 Main street, and not knowing the party I took it for inquiry to the lady who had charge of the house, and she didn't know anything about it, and I inquired at the room of Mr. Champion, and he told me that that mail should be left at his office.

Q. Well, what did you do with the mail addressed to W. W. Ogden after that?

A. I always left it at Mr. Champion's office.

Q. That is when he was on Main street?

A. Yes, sir.

Q. Did Mr. Champion afterwards move his office?

A. Yes, sir.

Q. Where to?

A. I am not positive; I think the McCloud hotel.

Q. Did you leave W. W. Ogden's mail there too?

A. That mail along with Mr. Champion's mail was turned over to the carrier who carried that particular route.

Q. You don't know anything about that then?

A. No, sir.

Q. Did Mr. Champion ever come back to your carrier dis-
63½ trict again?

A. Yes, sir; he moved back to rooms in the Gill building 369 Elm street.

Q. How long did you deliver mail to him there

A. I don't remember how long it was——

Q. Up to the present time?

A. Yes, sir.

Q. How about Ogden's mail?

A. It went there along with his mail.

Q. You delivered it?

A. Yes, sir.

Cross-examination by Mr. DAVID:

Q. Did Mr. Champion ever tell you that he was W. W. Ogden?

A. No, sir.

Q. Do you know W. W. Ogden?

A. Never did.

Q. You have been delivering mail that was addressed to W. W. Ogden?

A. Yes, sir.

Q. Where did you first deliver that mail?

A. 385 Main street.

Q. You don't know but what W. W. Ogden was some person having an office where Mr. Champion was, do you?

A. No; I don't know that.

Q. All you know is that Mr. Champion told you to leave W. W. Ogden's mail with him or at his office?

A. At his office.

Q. How many rooms were kept at that office where you delivered this mail, how many rooms in the suite?

A. I am not positive about that; I think he occupied two or three rooms.

Q. You don't know who rented or paid the rent of that office?

A. No, sir.

Q. How many persons were there in the office?

A. Oh, at that time I don't think there was, so far as I can remember, any one except—he and his wife only.

Q. Weren't there three persons there?

A. I don't remember any three parties there.

Q. How long ago was this?

A. I should judge three or four years ago.

Q. There was no particular reason why you should charge your memory with it?

A. No, sir. That is the reason why I can't state the dates positively.

Q. How long did you continue to deliver mail there?

A. Well, for some months until he moved to the other part of the city.

Q. Afterwards, in the usual course of business you continued to deliver the mail of W. W. Ogden to where Mr. Champion moved?

A. He moved to another carrier district.

64 Q. And you don't know anything about that part?

A. No, sir.

Q. That continued about how long, where you first delivered the mail?

A. It was several months, I couldn't say how long.

Q. What building did you say this was?

A. 385 Main street.

Q. Do you say that Mr. Champion then moved out of your district?

A. Out of my district?

Q. Are you sure about that?

A. Yes, sir.

Q. Was the corner of Elm and Ackart in your district?

A. Yes, sir.

Q. Don't you know that Mr. Champion moved from Main street to this last place on Elm street?

A. I think perhaps he did.

Q. Right over Brigg's and Bradford's grocery store?

A. That is not in my district.

Q. It is not?

A. The first place is, the second place not.

Q. Please explain what you mean.

Mr. TISDEL: Across the street perhaps.

A. I mean by that that Ackart street is the division line between 1 and 6 and 4 and myself.

Mr. DAVID: And this particular store that I speak of——

A. That is in route No. 6.

Q. That was not in your district?

A. No, sir.

Q. You never delivered mail there?

A. No, sir.

Q. Then subsequently Mr. Champion moved back into your district?

A. Yes.

Q. Where was that?

A. 369 Elm, or more strictly speaking, his office was over 371; the doorway was between the two.

Q. Was the mail addressed to W. W. Ogden that you last delivered addressed to this number?

A. I have had some few pieces addressed there but not many; they nearly always came addressed plain Dallas.

Q. Without any further instructions or conversation you had delivered the mail in this way?

A. On the former order.

Q. And you never knew who W. W. Ogden was?

A. Never did.

Q. And there were how many persons in this last building, in this last office, in the office where Mr. Champion had his office?

A. I didn't know until recently of but one young man that seemed to have charge of the office, latterly there has been two.

Q. What you mean is that where you delivered the first mail at the Main Street building you never knew of more than two persons occupying the office?

A. I never did only the two. If there was more there I didn't come in contact with them.

Q. They might have had their office there without you knowing it?

A. That is true.

64½ Q. It is not an unusual thing in delivering mail to receive orders to deliver mail addressed to a certain person to another person?

A. It is not.

Q. And is it not an unusual thing for you not to inquire who that individual is?

A. I very seldom do. It is not part of my business only in certain instances where mail must be delivered to the person only.

Q. And this is not one of those cases?

A. No, sir.

Q. For whom Mr. Champion was receiving the mail of W. W. Ogden you don't know?

A. I don't know.

Redirect examination by Mr. TISDEL:

Q. How much mail have you been in the habit of delivering to Champion's address?

A. Well, I delivered considerable mail there.

Q. Would it average a letter a day or ten or one hundred?

A. More than a letter a day.

Q. Make the best guess you can; of course you can't state accurately, what the mail averaged, as near as you can tell, for Mr. Champion and Mr. Ogden?

A. For Mr. Ogden scattering; Mr. Champion got considerable mail, sometimes four or five or six letters a day, and sometimes only one or two.

Mr. DAVID: When you speak of Champion you mean the defendant.

A. Yes, sir; I mean this Mr. Champion here, C. F.

*Testimony of Park Arnold.*

PARK ARNOLD, called as a witness on behalf of the prosecution, being first duly sworn, was examined in chief by Mr. Tisdel, and testified as follows:

Q. What is your name?

A. Park Arnold.

Q. What is your business?

A. I run the elevator at 369 Elm street.

Q. Do you know Mr. Champion, the defendant?

A. Yes, I know him; I have never been introduced to him.

Q. How long have you been the elevator boy there?

A. About six months.

Q. Does Mr. Champion have his office in that building?

A. Yes, sir.

Q. Do you know who else has an office in that building with Mr. Champion, how many more people are in the office?

A. There is no one in there except Mr. Parkes.

Q. Do you know of Mr. W. W. Ogden having an office in that building?

A. No, sir.

65 Q. Have you ever heard of him in connection with the building?

A. Yes, sir.

Q. Has there been latterly within three or four weeks anybody in the office who have made their headquarters there?

A. Mr. Champion's brother has been there occasionally.

Q. He has been there recently?

A. Yes, sir.

Q. As elevator boy in that building did you ever have any inquiries from people asking you for Mr. W. W. Ogden's office?

A. Well, I have occasionally seen messenger boys go up in the elevator, and they have asked me for Mr. W. W. Ogden.

Q. Where did you direct them?
A. To Mr. Champion's office.

Cross-examination by Mr. DAVID:

Q. Did Mr. Champion tell you to direct them there?
A. No, sir, Mr. Parks did.
Q. The only information you received from anybody directing anybody there for the name of Ogden was from Mr. Parks?
A. Yes, sir.
Q. You don't know but what Mr. Parks was W. W. Ogden himself?
A. I know Mr. Parks is not W. W. Ogden.
Q. Did he tell you that?
A. No, he never told me, but——
Q. But what?
A. I know that is not his name.
Q. Why certainly, you don't know but what he went under the name of W. W. Ogden?
A. I don't know what name he went under.
Q. You don't know but what Mr. Champion's brother went under the name of W. W. Ogden?
A. No, I couldn't swear to that.
Q. You never heard anybody call Mr. Champion, the defendant here, W. W. Ogden?
A. No, sir.
Q. Who told you that this man's name was Champion?
A. Well, Mr. Parks.
Q. So when you use the name of Champion you don't know it is his name except from what Mr. Parks told you?
A. No, sir.
Q. You don't know him very well?
A. No, sir.
Q. When you say his name is Champion you don't want to be understood as saying you know it?

Mr. TISDEL: I will concede that he doesn't.

Mr. DAVID: When you say a person's name is so and so, you are supposed to know more than that some person casually told you. Isn't that correct? The only way you know the name of Champion is because Mr. Parks told you?
A. Yes, sir.
Q. How did Mr. Parks happen to tell you that his name was Champion?
A. I asked him.
651½ Q. You asked him who that man was?
A. Yes, sir.
Q. Was Mr. Champion's name on the door?
A. Yes, sir. C. F. Champion on the office door.
Q. But you don't know even the man himself whose name is

there on the door? And so far as you know anybody might have rented the office, only so far as somebody told you?

A. No, sir.

Q. How many tenants are in that building?

A. Well, I don't really know; there is a good many though.

Q. Do you know them all?

A. Yes, sir.

Q. You know all the people who have offices in that building?

A. Yes, sir.

Q. And all the people who have desk room?

A. Yes, sir.

Q. You won't say that a person is not in the habit of visiting the office of C. F. Champion whose name is W. W. Ogden?

A. No, I don't know W. W. Ogden.

Q. You won't say that there was not a man by the name of W. W. Ogden, who was not the defendant here, and who was not Mr. Champion's brother or Mr. Parks, who was in the habit of visiting the office of Mr. Champion?

A. No, sir.

Q. You don't pretend to know the names of all the visitors to these offices?

A. No, sir.

Q. That is not your business and you don't care anything about it?

A. No, sir.

Q. There might have been a man calling every day at Mr. Champion's office whose name was W. W. Ogden?

A. No, sir, I can't swear to that.

Q. When you say that you don't know a man by the name of W. W. Ogden who had an office there you simply mean that nobody ever informed you that there was a man named W. W. Ogden who had an office there?

A. Yes, sir.

Q. That is all you want to be understood as saying?

A. Yes, sir.

Q. How many rooms are there in this office?

A. In Mr. Champion's office; two.

Q. How many desks?

A. Two.

Q. How many tables?

A. Well, there is—I don't know, I never paid any attention to that. There are tables in the back room.

Q. You are hired to run the elevator?

A. That is my business running the elevator, and I never paid much attention to Mr. Champion's office.

Q. How long have you been there?

A. About six months.

Q. Did you ever ask Mr. Parks who W. W. Ogden was?

A. Yes, sir.

66 Q. In Mr. Champion's presence?

A. No, sir.

Q. When did you see Mr. Champion, the defendant, in Dallas last?

A. I think it was in January.

Q. Do you remember the date in January?

A. No, sir.

Q. Was it the first part or the last part?

A. Well, really I can't tell you.

Q. Did you see Mr. Champion in Dallas in the month of February at all?

A. Well, I don't remember, it was either January or February.

Q. Don't you know? That is not very long ago.

A. That is right. I don't pay any special attention to it because it was not my business.

Q. Well, you have some recollection?

A. It is in January as far as I can remember.

Q. Assuming that it was in January that you saw him there, have you seen him in Dallas since?

A. No, sir.

Q. Do you know whether he was in Dallas at any time after the 5th of February?

A. No, sir, I don't.

Q. Did you see him in Dallas after the 5th of February?

A. No, sir.

Q. Did you ever have any conversation with Mr. Champion's brother?

A. No, sir, just to speak to him.

Mr. TISDEL: Is Elm street one of the principal business streets of Dallas?

A. Yes, sir, one of them.

Q. Do you have a great many people go up and down in the elevator every day?

A. Yes.

Q. How many floors are there in the building?

A. Five.

Q. Can you make anywhere near an approximation of the number of rooms on the floors?

A. The rooms begin at 200 and they go to 504 or '5. The first floor begins at 200, and the numbers run to 213.

Q. What about the third floor?

A. The third floor they run from 300 to 306.

Q. Only six rooms?

A. Yes, sir.

Q. That would be nineteen. Now, on the fourth floor?

A. On the fourth floor they run from 400 to 405.

Q. About five rooms on that floor?

A. Yes, sir.

Q. Now on the top floor?

A. On the fifth floor runs from 500 to 505.

Q. That is 29 or 30 rooms above the street?

A. Yes, sir.

Q. And the first floor occupied by stores?

A. There is only four offices—there is Mr. Champion's office, the Texas State office, the soda company's office—the rest are rooms. People have rooms up there.

66½ Q. There are only four business offices in the building then?

A. Yes, sir.

Q. And the other 25 rooms are occupied by people who live there?

A. Yes, sir.

Q. Now, if there is anybody in the habit of going as a visitor for instance, as Mr. David put it, in the habit of going there every day, while you might not know the name would you or would you not be apt to remember that that person came there every day?

A. Yes, sir.

Q. Do you recollect any such visitor coming there day after day?

A. No, sir.

Mr. DAVID: How long have you been running the elevator there? How long has the elevator been running?

A. Oh, it has been running for six or seven months; it ran about four years and it stopped running, and when I began working there I started the elevator running.

Q. It has been running continuously for six months?

A. Ever since I have been there.

Q. Mr. Champion's office is on the second floor?

A. Yes, sir.

Q. And you don't pretend to say that if people were in the habit of walking upstairs there——

A. Sometimes they do.

Q. Lots of people don't like to ride up in elevators, particularly in Texas, isn't that true?

A. Yes, sir.

Q. You don't say that you pretend to pay any attention to Mr. Champion's office?

A. No, sir.

Q. And if there had been any regular visitor who rode up in the elevator to Mr. Champion's office you would have known it?

A. Yes, sir.

Q. And if they walked upstairs you wouldn't have known it?

A. That is right.

Q. Those two rooms occupied by Mr. Champion as you say, there was an entrance to each?

A. Yes, sir.

Q. An entrance to each room?

A. You can go right from his room to the other.

Q. Can you enter each room from the hall?

A. Yes.

Q. Now, Champion's name is on the one door?

A. Yes, sir.

Q. Which door?

A. 201, I think, 200 or 201.

Q. You have been there six months?

A. Yes, sir.
Q. And you are reasonably certain that is the number?
A. Yes.
Q. Do you know which office Mr. Champion's desk is in?
A. Yes, 201.
Q. That is the office which you think he occupied?
A. Yes, sir.
67 Q. Is that the same one——
A. They both belong to him.
Q. Have you seen him pay the rent?
A. Yes; he paid the rent, I have collected it; he has paid it to me.
Q. Has he got a lease?
A. No, sir—I don't know whether he has or not; I can't tell about that. I didn't attend to that part of it.
Q. You don't know who rents from him?
A. No, sir.
Q. You don't know what rent is paid to him?
A. No; but there is no one occupying that other office except him.
Q. I thought you said Mr. Parks was in there?
A. He is working for Mr. Champion.
Q. How do you know?
A. Well, I don't know——
Q. Who have you talked to about this case?
A. Nobody at all.
Q. No living soul?
A. No, sir.
Q. Nobody asked you what you knew?
A. No, sir.
Q. And when you were asked to come here from Texas nobody asked you what you knew?
A. No, sir.
Q. You never told a living soul what you have known about this matter until you testified here?
A. I told the deputy marshal down there, yes.
Q. Do you mean the deputy marshal?
A. Mr. Green, I believe, is the marshal.
Q. You have never told anybody in Chicago what you knew?
A. No, sir.
Q. When you were subpœnaed to come here, the only man that you had talked to was the deputy marshal?
A. Yes, sir.
Mr. TISDEL: The marshal himself?
A. Yes, sir.
Mr. DAVID: The marshal himself?
A. Yes, sir.
Q. Told him all you knew about it?
A. Yes, sir.
Q. Amongst other things, you told them that Mr. Parks worked for Mr. Champion?
A. I didn't tell them that.
Q. He didn't ask you that?

A. No, sir.

Q. And you will say that Mr. Champion has paid him rent?

A. Mr. Champion has not paid me; Mr. Parks paid it.

Q. Didn't you say that Mr. Champion paid you?

A. If I did, I didn't mean it. Mr. Parks paid it.

Q. You don't know but what Mr. Parks himself rented those rooms?

A. I couldn't swear who rented them.

Q. You don't know but what Mr. Champion rented from Parks?

A. I don't know it.

Q. But you say Mr. Parks worked for Mr. Champion?

A. I was just guessing at it.

Q. Have you been guessing at most of your testimony here?

A. No, sir.

67½ Q. When you have been answering that Mr. Champion occupied the two rooms——

A. I didn't guess at that.

Q. Do you know anything else except that his name is on the door?

A. No, sir.

Q. And that is your only reason?

A. Yes, sir.

Q. You have never spoken a dozen words to Mr. Champion in your life?

A. No, sir.

Q. Who paid the rent last month?

A. I couldn't tell. Mr. Hardy's son is the fellow who had charge, and has been collecting it the last two months. I haven't had charge of that.

Q. Can you state one word that you ever spoke to Mr. Champion, the defendant in this case?

A. Yes; he and I were talking about putting up some electric lights in his room, and he said if I put the light in he would pay for it, and Mr. Hardy wouldn't have it.

Q. That is the only conversation you ever had with him?

A. Yes, sir.

Q. And the only reason that you know those rooms were rented by Mr. Champion, the defendant in this case, was because the name was on the door?

A. Yes, sir.

Q. And the rent was usually paid by Mr. Parks?

A. Yes, sir.

Mr. TISDEL: Mr. Parks' name on the door?

A. No, sir.

Mr. DAVID: I would like to ask if there is any contention or claim that this defendant was in Dallas at any time when it is claimed that any of these offenses charged in this complaint were committed?

Mr. TISDEL: No; there is no contention that he was there at the time. It is not admitted that he was not there, but the Government has no proof that he was there.

*Testimony of E. J. Riley.*

E. J. RILEY, a witness called on behalf of the prosecution, being first duly sworn, was examined in chief by Mr. Tisdel, and testified as follows:

Q. What is your name?
A. E. J. Riley.
Q. What is your business?
A. Local agent for Wells Fargo Company, Dallas, Texas.
Q. How long have you been there in that position?
A. 18 months.
Q. Have you the outgoing register of packages for the month of February?
A. I have it for certain days.
Q. Have you your book with you that shows those dates you have reference to?
A. The 14th of February, isn't it?
68 Q. Look at the outgoing sheet for the 14th of February. Now under that date did your people send a package to A. H. Benson, Wilcox, Arizona Territory?

Mr. DAVID: This testimony all goes in subject to objection.
The COMMISSIONER: Yes, sir.

A. Yes, sir.
Mr. TISDEL: And one for Samuel Abraham, Clifton, Arizona Territory?
A. Yes, sir.
Q. James A. Ward, Fresno California?
A. Yes.
Q. Paul H. Migel, San Bernardino, California?
A. Yes.
Q. Now look at the packages which I show you, and tell me if you know whether those packages went out from your office——
A. I can't identify the packages positively; I never saw them until I was shown them by the Government attorney in Dallas.
Q. Is there anything in this that shows they were shipped from Dallas?
A. Yes, sir.
Q. What is the custom with reference to these papers in your office?
A. It is put on all packages going out of Dallas.
Q. Is it put on packages coming in?
A. The stamp of the Dallas office would not be.
Q. But similar stamp?
A. Yes, sir; showing the point of origin.

Cross-examination by Mr. DAVID:

Q. Read what it says there.
A. "S. Abraham. Package. One package. Prepaid, 25 cents."

Q. Whose handwriting is that?
A. That is the bill clerk's—our bill clerk at Dallas, Texas.
Q. Is that a copy, or is that the original?
A. That is a tissue copy, taken from the original.
Q. But you don't know that this package of S. Abraham's refers to this one?
A. No, sir.
Q. It is not your handwriting?
A. No, sir.
Q. And you don't know of your own knowledge that any package was ever sent through the Wells, Fargo Express Company from Dallas, Texas, to that party?
A. No, sir.
Q. What is that date?
A. The 14th of February. I know just what the records show.
Q. The law doesn't make this a record. You don't know of your own knowledge whether any package was ever sent to this man S. Abrahams, Clifton, Arizona, on the 14th of February, 1899?
A. I didn't see the package go out; no, sir.
Mr. TISDEL: It is admitted that Mr. Riley does not know anything except what this record shows.
68½ Mr. DAVID: You don't say that that is a record in the legal sense?
Mr. TISDEL: We don't say that. We are going to ask the commissioner to draw an inference from the existing facts.
Mr. DAVID: Turn to the other items, please.
A. What do you want next?
Q. S. H. Benson, Wilcox, Arizona.
A. Yes.
Q. Now that is on the same date?
A. Yes, sir.
Q. What is there there indicating that it is February 14th?
A. This (indicating): "S. H. Benson, one package 25 cents prepaid."
Q. Now the same is true of this entry as of the other?
A. Yes, sir.
Q. You have no personal knowledge of it?
A. No, sir.
Q. As a matter of fact you have no personal knowledge that any of these packages went out?
A. I didn't see any of them.
Q. You don't know that any package was ever brought into the office on that date for S. H. Benson?
A. I didn't see the package, and I suppose I don't know it.
Q. The next one, James A. Ward, Fresno, California. "Freight waybill, Dallas, Texas, to Fresno, one package 25 cents prepaid." The same is true of that as of the other packages?
A. Yes, sir.
Q. The same is true also of the package for Paul S. Migel, San Bernardino, California, as you stated of the other packages?
A. Yes, sir.

Q. You say there is something on the packages to indicate that they went into the Wells, Fargo Express Company at Dallas, Texas?

A. Yes, sir.

Q. This stamp?

A. Yes, sir.

Q. When was the first time you saw these packages?

A. They were shown to me by the prosecuting attorney at Dallas.

Q. Where this was put on you don't know?

A. I didn't see it put on.

Q. There is no mark of identification on that stamp, is there?

A. No.

Q. What is that?

A. It indicates the originating point.

Q. There is nothing that you can identify it by as ever having been in the possession of the Wells, Fargo Express Company?

A. The stamp.

Q. There is nothing remarkable about that, the printing or anything?

A. No, sir.

Q. That is true of all the packages?

A. Yes, sir.

Q. In other words, you will not testify from the appearance of the packages themselves and the records you have here that
69 you know that these packages were ever in the possession of the Wells, Fargo Express Company?

A. I simply know the addresses on the packages correspond.

Q. Is there anything there from which you say that you know that either of these packages were ever in the Wells, Fargo Express Company?

A. No, sir; I never saw them in their possession.

Q. Do you know the defendant?

A. Yes, sir.

Q. How long have you known him?

A. About seven—perhaps eight years, seven or eight years.

Q. Do you know what is the business of the defendant?

A. No, sir; I first knew him in the advertising business, and I have not seen much of him since that.

Q. Did you ever know him by any other name except C. F. Champion?

A. No, sir.

Q. How long have you been connected with the express company?

A. About 9 or 10 years.

Q. Did you ever hear him called by any other name than that of Champion?

A. No, sir.

Q. Now when a man comes into your office to ship a package similar to these, you don't require identification of the person *to* sends it?

A. No, sir.
Q. Nor the age of the person?
A. No, sir.
Q. In fact you will ship a package without its being prepaid?
A. We usually inquire into the reliability of the man if it is not prepaid.
Q. Where they are prepaid you make no inquiry at all?
A. No questions asked.
Q. Do you know when you saw Mr. Champion last prior to his coming to Chicago?
A. No, I can't remember. The last time I remember meeting him in Dallas was a year ago next May. I don't remember meeting him since that time.

*Testimony of Richard Hudson.*

RICHARD HUDSON, a witness called on behalf of the prosecution, being first duly sworn, was examined in chief by Mr. Tisdel, and testified as follows:

Q. What is your name?
A. Richard Hudson.
Q. What is your business?
A. Deputy collector of customs at Deming, New Mexico.
Q. Ever see this stuff before (indicating)?
A. Yes, sir.
Q. Where did you see it?
A. I got a telegram——

Mr. DAVID: I object. I concede that he seized these things.

69½ A. I seized them from an express car that was passing through there that night that the telegram came on the orders of the special agent of the Treasury Department at El Paso, Texas.

Mr. TISDEL:

Q. Where did you seize them from?
A. From the express car going through to Arizona and California and other parts. It came from El Paso that afternoon, and I took it off that car.
Q. In the town of what?
A. Deming, — Mexico.
Q. On what road?
A. The Southern Pacific.

Cross-examination by Mr. DAVID:

Q. They were seized in transit?
A. Yes, sir.
Q. Mr. Hudson, you are the gentleman who made the complaint here?
A. Yes, sir.

Q. And you made it upon the sole fact of the seizure of these papers?
A. Yes, sir.
Q. You don't know the defendant?
A. Never saw him.

Mr. DAVID: I presume you offer these things in evidence?
Mr. TISDEL: Oh, yes.

Mr. DAVID: You made this complaint based solely upon the seizure of these packages?
A. Yes.
Q. And you don't know the defendant?
A. No, sir, never saw him before until yesterday.
Q. Did you go to Texas before you came here?
A. I came through Texas.
Q. Did you stop?
A. No, sir.
Q. Did you go to Dallas?
A. Went to Dallas but didn't get off the train there.
Q. Spoke to no one?
A. No, sir.
Q. And you have spoken with no one at Dallas, Texas?
A. No, sir, I didn't get off the train there.
Q. Did you talk to any one since you have been here about the case?
A. The United States attorney and his assistant.
Q. You haven't talked with any of the witnesses here about what you knew?
A. Not particularly; I simply met them and we walked together——
Q. No one told you what they knew?
A. Not particularly.
Q. And you made this complaint only on the information you had; this complaint was based solely on the seizure of these packages?
A. The seizure of these packages.
Mr. TISDEL: Did you ride with the district attorney from Fort Worth to Dallas?
A. He came to see me.
70 Q. Did you ride that thirty miles together on the train?
A. No, sir.
Q. Did he tell you anything about this case?
A. He told me I had to report at the district attorney's office in Chicago.
Q. You were present, were you not, when the witnesses were together and questioned and the situation talked over in the district attorney's office?
A. Yes, sir.
Q. You heard the whole story?
A. I heard them talk at different times.

Q. You were present this morning in here when I questioned them?

A. Yes, sir.

Q. And you heard me talking with them?

A. Yes, sir.

Mr. DAVID: Have you heard any more than what has been testified to here—you don't know what has been testified here?

A. No, sir.

Q. I want you to tell what you heard.

A. A general talk in the district attorney's office yesterday, and a general talk this morning, the deputy marshal and the express messenger——

Mr. DAVID: I insist that I have a right to have all the talk.

The COMMISSIONER: Tell what was said, there.

Mr. TISDEL: Tell what the marshal said and what each witness said in your hearing, as far as you recollect.

A. I didn't take much notice there except I heard the marshal say that he got these boxes that I seized—I seized eleven and he only brought four of them.

Mr. DAVID: You mean this gentleman here?

A. Yes. I said "Where are all these packages?" I had directions in the telegram——

Mr. TISDEL: What did the marshal say here?

A. The marshal said he seized these packages addressed to three men and arrested the three men, or two men down there and one of them here, and opened up one of the boxes and showed some lottery tickets, and the express messenger said he could swear they were sent from there.

Q. That is Mr. Riley?

A. Mr. Riley; and the other boy said he could testify to certain mail being delivered, and the letter-carrier testified that he delivered certain mail. I wasn't much interested in the case, only just what I heard—and that is just about all I know about it.

Q. You were not listening to the conversation for the purpose of making the complaint, were you?

A. No, sir.

Q. Have you told us practically now all that you heard that you remember; that is, I mean, heard in the conversation, that the district attorney asked you about?

A. I don't know anything more.

70½ Q. Is there anything more that you remember that you heard said by anybody in reference to this case?

A. I can't remember anything more in particular but what I have already gone over.

*Testimony of G. E. Robinson.*

G. E. ROBINSON, a witness called by the prosecution, being first duly sworn, was examined in chief by Mr. Tisdel, and testified as follows:

Q. What is your name?
A. G. E. Robinson.
Q. What is your business?
A. Chief officer of the deputy marshal, northern district of Texas.
Q. Do you know the defendant, Mr. Champion?
A. Yes.
Q. How long have you known him?
A. Six or seven or eight years. I got acquainted with him the latter part of 1892 or the first of 1893.
Q. Did you go into the office on Elm street with a search warrant recently?
A. Yes, sir.
Q. I will ask you if you have ever seen this stuff here?
A. Yes, sir.
Q. Where did you see it? Where did you get it?
A. I got it in the Gill building, second floor in Dallas.
Q. In whose office?
A. In Champion's office.

Mr. DAVID: What is the object of this?

Mr. TISDEL: The object is to show that a lottery business was carried on at that place, and it is offered for the purpose of connecting this testimony.

Cross-examination by Mr. DAVID:

Q. How long have you known Mr. Champion?
A. Since 1892 or 1893.
Q. Ever know him by the name of W. W. Ogden?
A. No, sir.
Q. Ever hear him called W. W. Ogden?
A. No, sir.
Q. How long have you known him?
A. Since 1893 or 1892.
Q. Whom did you find in the office when you made this seizure?
A. In the office, Charlie Park was there, and we waited for quite awhile, and then the other Champion came in, the brother of Mr. Champion here.
Q. Do you know he is his brother?
A. He was introduced by Mr. Parks as Mr. Champion's brother.
Q. Do you know he is his brother?
A. Well, Mr. Champion since I have been here told me he was his brother.
71 Q. You went into the office?
A. Yes, sir.

Q. Did you have a conversation with them?

A. We went in there for the purpose of arresting them on a warrant.

Q. You had a warrant against Parks and Champion?

A. Yes, and Mr. Champion here.

Q. You knew Mr. Champion wasn't in that city?

A. No, I didn't know it, but the boys who worked up the case knew it, I think.

Q. When was this arrest made?

A. The latter part of February.

Q. What time in February?

A. I think 27th or 28th. The search warrant was made out before.

Q. Do you know whether Mr. Champion, the defendant in this case, was in Dallas any time after the first of February?

A. I haven't seen Mr. Champion in Dallas for several months, I don't know how many months.

Q. More than two months?

A. More than two months. I don't think I saw him at the time he said he was there.

Q. How many parties were in the office at the time you came to make the arrest?

A. One Charlie Parks.

Q. What room did you find this stuff in?

A. We found that stuff (indicating) in the back room of the office.

Q. Was that the room that the defendant Champion's name was on?

A. No, sir.

Q. Wasn't there another door to that room from the hall?

A. I think that that door was fastened up.

Q. Did you try it?

A. I think I did, but I am not positive about that.

Q. You don't mean to say that there was not an entrance to that room?

A. There was a door, but my impression is that it was fastened up.

Q. At that time?

A. Yes, sir.

Q. Whether it was usually or customarily you don't know?

A. No, I don't know. There is a folding door between the two rooms.

Q. You don't know who rented that office?

A. No, sir.

Q. You don't know whether Mr. C. F. Champion authorized his name to be put on that door?

A. No, sir.

Q. There was nothing in the seizure of these things to connect the seizure in any way with the defendant, C. F. Champion, except that his name was on the door?

A. Those things (indicating).

Q. Anything at all to show that Mr. Champion is connected with any of these things?

A. Yes, Mr. Champion's name on that.

Q. There is nothing on this (indicating) — that it is a 71½ stamp for a lottery, is there?

A. My eyes are very poor, sir, and I didn't read it.

Q. Is there anything about a lottery there?

A. It speaks for itself.

Q. Did you know what business Mr. Champion was in?

A. No, I don't believe I did, not of my own personal knowledge.

Q. Did you ever transact any business with Mr. Champion?

A. No, sir, I never transacted any business with him at all.

Q. Were you acquainted with him socially?

A. Yes, always very friendly when we met on the street.

Q. Now, in the second room you found this; tell us what you found in the first room.

A. I can tell you what we found in the first room; this we found in the back room.

Q. This, indicating the white and blue circulars?

A. They were found in the back room in the closet, a kind of storage place they had.

Q. In the back room?

A. Yes.

Q. And these also?

A. They were found in the front room, in the desk.

Q. Is there anything you found in the room occupied apparently by Mr. Champion, anything in relation to any lottery?

A. Our search warrant called for the Pan-American. We took everything we found with Pan-American on it.

Q. This other you found in the closet?

A. Yes, sir.

Q. Did you break open the desk?

A. No, sir; we unlocked the desk.

Q. Did you have a key?

A. We got a key from the jailor. The boys were put in the jail.

Q. Mr. Champion, the defendant, was not there at all?

A. No, sir.

Q. These men that were there had keys to the desk?

A. Yes, sir.

Q. And who were using these desks you don't know?

A. No, sir, I don't know.

Q. Whose desks they were you don't know?

A. No, sir.

Q. This was what date in February?

A. I think it was the 1st of March; that is my impression.

Q. The seizure of these things was subsequent to the making out of the complaint?

A. Yes, sir.

Q. Of course you understood well that Mr. Champion was not in the city at that time?

A. Yes, sir.

Mr. TISDELL: Now, with reference to these boxes, were you present when either of them was opened?

A. No, sir. I don't think I was——

72 Q. Look at this. Whose initials are these?

A. Those are my initials.

Q. This box was opened for the first time yesterday?

A. Yes.

Q. Whose possession have they been in?

A. I received them from the district attorney. This was opened yesterday in the district attorney's office, and I put my initials on this box.

Q. How many were open?

A. One.

Mr. DAVID: This was opened yesterday?

A. Yes.

Q. Who brought it here?

A. I did.

Q. From where?

A. From Dallas, Texas.

Q. Who gave it to you?

A. I got it from the district attorney's office.

*Testimony of Richard Hudson (Recalled).*

RICHARD HUDSON recalled:

Mr. DAVID: What is there on this package to indicate that this is one of the packages you seized?

A. I addressed all of these.

Q. And that is your handwriting?

A. Yes, sir.

*Testimony of G. A. Robinson (Recalled).*

J. A. ROBINSON resumed:

Mr. DAVID: Where did you get this package from?

A. I got that from the district attorney's office in Dallas. His clerk gave it to me, all four of those packages.

Q. You don't know whether they had been opened before or not?

A. They were——

Q. Is there anything to show that they could not have been opened and put in the same condition again?

A. Certainly not.

Q. In other words you won't swear that these packages were received at El Paso, Texas, from Arizona with this stuff in them?

A. I don't know anything about the packages beyond what I have said.

Q. The district attorney gave it to you to take to Chicago?

A. Yes.

Q. And they were opened here?

A. One of them was, and I think that gentleman was present when this was opened.
Q. Who opened this one (indicating)?
A. I don't know.

Mr. DAVID: Then this one is eliminated?
The COMMISSIONER: I don't think that would be material.

721/2 *Testimony of T. J. Cooper.*

T. J. COOPER, a witness called on behalf of the defendant, being first duly sworn, was examined in chief by Mr. David, and testified as follows:

Q. What is your name?
A. T. J. Cooper.
Q. What is your business?
A. I am in the subscription-book business.
Q. Associated with the defendant, C. F. Champion?
A. Yes, sir.
Q. Give us your address please?
A. 17 Quincy street.
Q. Is that where you live or your place of business?
A. Place of business.
Q. What kind of books do you sell?
A. Why we sell various books, the one we are pushing at present is the history of our war with Spain.
Q. C. F. Champion was with you in the business?
A. Yes, sir.
Q. How long have you known Mr. Champion?
A. I have known Mr. Champion about three years.
Q. Where did you first get acquainted with him?
A. Dallas, Texas.
Q. Did you ever know him under the name of W. W. Ogden?
A. No, sir.
Q. Did you ever hear him called W. W. Ogden?
A. No, sir.
Q. How well have you known Mr. Champion?
A. Well, I have known Mr. Champion very well.
Q. What was your business in Dallas?
A. My business there was subscription books; and I was agent for the Hammond typewriter, and in connection with that I conducted a rubber-stamp business.
Q. How long have you been in business with Mr. Champion?
A. Since about the 14th of November.
Q. Since the 1st day of February, 1899, how frequently have you seen Mr. Champion?
A. I think I have seen Mr. Champion on an average every other day.
Q. Here in Chicago?
A. Yes, sir.

Q. Has there been any interval since the first of February at any time, that you haven't seen Mr. Champion for two days?

A. No, sir; I don't think there has ever been.

Q. Where would you see him?

A. Part of the time at his house and part of the time at his place of business.

Q. Assuming now that it would take four days to travel to Dallas, Texas, and return, would it be possible for Mr. Champion,
73 any time since the first of February, 1899, to have gone to Dallas, Texas, and return?

A. No, sir.

Q. Without your having known it?

A. No, sir, there is not.

Q. Do you know Mr. Champion was not in Dallas, Texas, from the first of February, up to the present time?

A. Yes, sir, I do.

Q. And you say that during most of that interval you have not failed to see him within two days?

A. To the best of my judgment it was about every other day.

Q Can you state whether or not Mr. Champion was in Chicago on the 14th of February?

A. I think he was.

Cross-examination by Mr. TISDEL:

Q. How long were you in business in Texas?

A. I left Texas a year ago the 15th of last month.

Q. Were you ever in business in Dallas or any other portion of Texas with Mr. Champion?

A. No, sir.

Q. Have you ever been in the lottery business yourself?

A. No, sir.

Q. Did you or did you not ever tell anybody that you had been in the lottery business with Mr. Champion in Texas?

A. No, sir, I didn't.

Q. Do you know D. C. Matson?

A. Yes, sir.

Q. Did you or did you not tell D. C. Matson that you had been engaged in the lottery business in Texas?

Objected to.

Q. Did you see Mr. Champion on the 14th of February?

(Witness consults memorandum book.)

Q. Before looking at that, what is it?

A. This is an account book, in connection with my business. This memorandum shows that I saw him on the 15th.

Q. What is the memorandum? What does it show? What is it you know that is on this?

A. I received from him on that day $10.

Q. Let us see that. You remember receiving that $10?

A. Yes, sir.

Q. Did he give it to you personally?
A. Yes, sir.
Q. In money or in check?
A. In money.
Mr. DAVID: Have you any other items there, subsequent to the 15th when you received money from him?
A. I received money from him on the 20th.
Q. How much is that?
A. $18.
Q. What was that, money or check?
A. Check.
Q. Do you know what check it was?
A. Well, I couldn't say as to that.
Q. Do you do a banking business?
A. This is a check I received from Mr. Champion at his home.
Q. Do you keep an individual account?
A. No, sir, I do not.
Q. Do you know where you got the check cashed?
A. Yes, sir, the First national bank.
Mr. TISDEL: Was that Mr. Champion's personal check?
A. Yes, sir.

*Clerk's Certificate.*

STATE OF ILLINOIS, } ss:
*County of Cook,* }

Charles W. Phillips, being first duly sworn, on oath says that he is a court stenographer in the courts of Cook county and Federal courts holden in Chicago, and that he is as such stenographer competent to take down the testimony of witnesses in short-hand, and affiant further says that on the fourteenth day of March, 1899, he took down the testimony in short-hand of the witnesses heard and examined in the case of The United States *vs* C. F. Champion, before Lewis F. Mason, United States commissioner and that the foregoing thirty-nine pages of typewritten matter *is* a complete transcript of such testimony except the exhibits offered in evidence.

CHAS. W. PHILLIPS.

Subscribed and sworn to before me this 17th day of March, A. D. 1899.

JAMES HARTNETT,
*Notary Public.*

[SEAL.]

Writ allowed & writ of certiorari granted both returnable before Judge Grosscup, Friday, March 24, 1899, at 10.30 a. m. Surety for appearance in the sum of $2,500.

JAS. G. JENKINS.

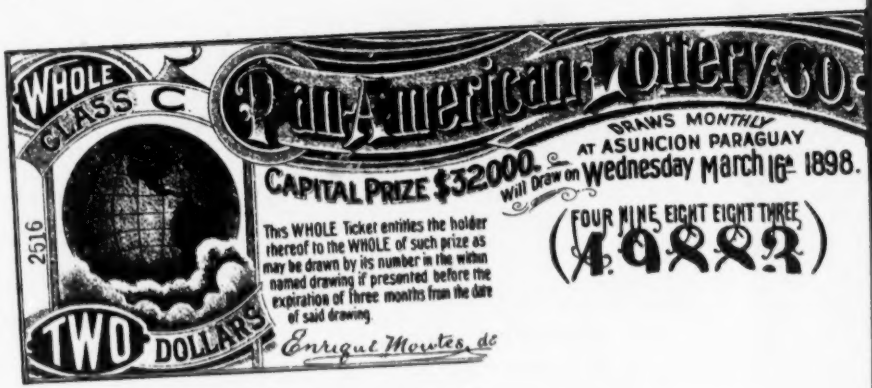
22 March, '99.

*Exhibit 1.*



53

EX. 1.


WHOLE
CLASS C
Pan-American Lottery Co.
DRAWS MONTHLY
AT ASUNCION PARAGUAY
CAPITAL PRIZE $32000.
Will Draw on Wednesday March 16th 1898.
2516
This WHOLE Ticket entitles the holder thereof to the WHOLE of such prize as may be drawn by its number in the within named drawing if presented before the expiration of three months from the date of said drawing.
FOUR NINE EIGHT EIGHT THREE
TWO DOLLARS
Enrique Montes de

(Endorsed) Filed Mar. 22, 1899.

S. W. BURNHAM,
Clerk.

Exhibit 2—Advertisement. 54

EXHIBIT 2.

**THE**
**PAN-AMERICAN**
**LOTTERY**
**DRAWS**

# Next Wednesday

| | | |
|---|---|---|
| $32,000.00 | for | $2 |
| $16,000.00 | for | $1 |
| $8,000.00 | for | 50c |
| $4,000.00 | for | 25c |

All reliable dealers handle the tickets.

You cannot win unless you take a chance, and SOMEBODY who takes a chance will win a **FORTUNE.**

**All prizes cashed here in the city.**

(Endorsed) Filed Mar 22, 1899.

S. W. BURNHAM,
Clerk.

75 EXHIBIT 3.

*Circular Letter.*

EXHIBIT 3.

TEXAS STATE AGENCY

# PAN-AMERICAN LOTTERY COMPANY

CAPITAL PAID IN, $1,000,000.00.

*Dallas, Tex.*.....

DEAR SIR:-

I have received your report, with contents as stated by you, and have balanced your account for last drawing. Thanking you, I am,

Very respectfully,

(Endorsed:) Filed Mar. 22, 1899. S. W. Burnham, clerk.

EXHIBIT 4.

*Directions.*

EXHIBIT 4.

*On* .....

Put Unsold Tickets and Cash, less Commission, in a Box and ship by Express to

C. F. CHAMPION,
DALLAS, TEXAS.

(Endorsed :) Filed Mar. 22, 1899. S. W. Burnham, clerk.

FOLD OUT IS TOO LARGE TO BE FILMED

EXHIBIT 5.

OFFICIAL DRAWING
of the
# PAN-AMERICAN LOTTERY
MONTHLY DRAWING
CLASS "J."

Drawn in the City of Asuncion, Paraguay. SEPTEMBER 21st, 1898. UNDER THE SUPERVISION OF

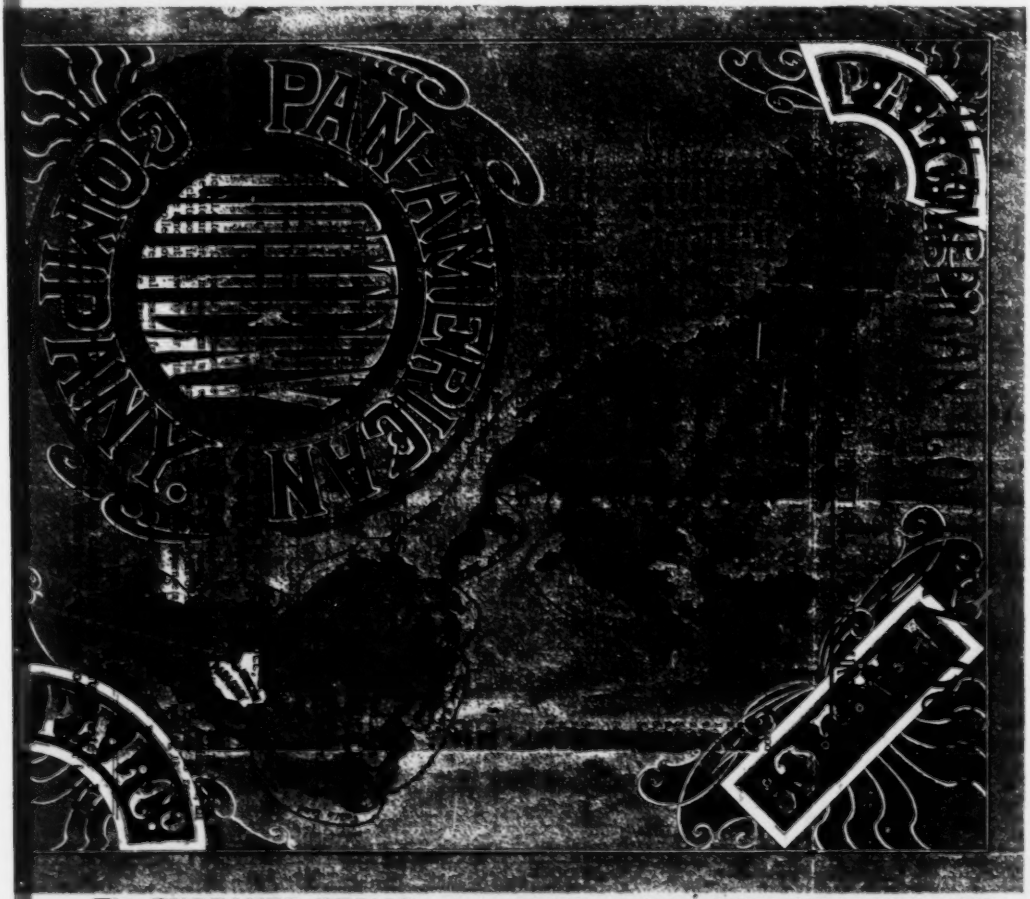
ENRIQUE MONTES DE LEON Manager. BERNARDO LOPEZ, Interventor.

(Indorsed) Filed Mar. 22, 1899.

S. W. BURNHAM,
Clerk.

150 prizes of $ 8 each, approximating to 2,000 prize.. 1,200

10—360




**The ENGRAVED DESIGN on the BACK, and the ENGRAVED HEADING of this list, patents for which have been applied for, are used to insure our patrons AGAINST DECEPTION in procuring GENUINE OFFICIAL LISTS OF THE PAN-AMERICAN DRAWING.**

76 EXHIBIT 6.

*Circular of Pan-American Lottery Co.*

EXHIBIT 6.

Our record in the past is our reference for the future.

Pan-American Lottery Company, Asuncion, Paraguay.

Capital stock, $1,000,000.

(Cut of building in Asuncion where drawings are held.)

Dates of drawings.

| | |
|---|---|
| Class A | Wednesday, January 18th, 1899 |
| Class B | Wednesday, February 15th, 1899 |
| Class C | Wednesday, March 15th, 1899 |
| Class D | Wednesday, April 19th, 1899 |
| Class E | Wednesday, May 17th, 1899 |
| Class F | Wednesday, June 21st, 1899 |
| Class G | Wednesday, July 19th, 1899 |
| Class H | Wednesday, August 16th, 1899 |
| Class J | Wednesday, September 20th, 1899 |
| Class K | Wednesday, October 18th, 1899 |
| Class L | Wednesday, November 15th, 1899 |
| Class M | Wednesday, December 20th, 1899 |

Pan-American Lottery Co.

Plan of the lottery.

100,000 tickets in wholes and fractions to suit purchasers.

Monthly ordinary drawings.

| | | |
|---|---|---|
| 1 | capital prize of | $32 000 |
| 1 | capital prize of | 15 000 |
| 1 | grand prize of | 5,000 |
| 1 | grand prize of | 2,000 |
| 3 | prizes of $500 | 1,500 |
| 10 | prizes of $200 | 2,000 |
| 20 | prizes of $100 | 2,000 |
| 100 | prizes of $50 | 5,000 |
| 200 | prizes of $30 | 6,000 |
| 300 | prizes of $20 | 6,000 |
| 500 | prizes of $10 | 5,000 |

*Approximate Prizes.*

| | | | | |
|---|---|---|---|---|
| 150 | prizes of | $20 each, approximating to | $32,000 prize | 3,000 |
| 150 | prizes of | 10 each, approximating to | 15,000 prize | 1,500 |
| 150 | prizes of | 8 each, approximating to | 5,000 prize | 1,200 |
| 150 | prizes of | 8 each, approximating to | 2,000 prize | 1,200 |

76½ *Terminals.*

| | | |
|---|---|---|
| 999 | terminals of $10 each, decided by the $32,000 prize. | 9,990 |
| 999 | terminals of $10 each, decided by the $15,000 prize. | 9,990 |
| 999 | terminals of $4 each, decided by the $5,000 prize. | 3,996 |
| 999 | terminals of $4 each, decided by the $2,000 prize. | 3,996 |
| 5,733 | prizes amounting to ..... | $116,372 |

The numbers from 1 to 100,000, corresponding with those numbers on the tickets printed on separate slips of paper, are encircled with small rubber tubes, and place- in one wheel. The prizes similarly printed and encircled, are placed in another wheel. The wheels are then revolved, and a number is drawn from the wheel of numbers and at the same time a prize is drawn from the other wheel. The number and prize drawn out are opened and exhibited to the audience and registered by the commissioners, the prize being placed against the number drawn. This operation is repeated until all the prizes are drawn out.

*Explanation of Approximation Prizes.*

The series of seventy-five numbers on each side of the numbers drawing the four largest prizes in each drawing will be entitled to the 600 approximation prizes. For example: If ticket No. 27325 draws the $32,000 prize, those tickets numbered from 27250 to 27400 inclusive (150 in all) will each be entitled to $20. If ticket No. 750 draws the $15,000 prize, those tickets numbered from 675 to 825, inclusive, will each be entitled to $10, and this rule applies to tickets numbered so as to come within the seventy-five numbers on each side of the tickets drawing the $5,000 and $2,000 prizes respectively, and all such tickets will be entitled to $8.

*Terminal Prizes.*

The 3,996 terminal prizes will be determined by the two terminal figures of the numbers drawing the four largest prizes in each drawing. For example: If the number drawing the $15,000 prize ends with 31, then all other tickets where the numbers end with 31 will be entitled to $10. If the number drawing the $32,000 prize ends with 62 or as the case may be, then all other tickets where the number ends with 62 will be entitled to $10, and this rule applies to tickets bearing the two last figures of the tickets drawing the $5,000 and $2,000 prizes respectively, all such tickets being entitled to $4.

77 *Price of Tickets.*

Whole tickets, $2.00; halves, $1.00; quarters, 50c.; eighths, 25c.

*Important Notice.*

Immediately after each drawing the entire result is cabled to the United States. This makes it possible for every buyer of a Pan-

American ticket to receive the official list in less than one week after the drawing.

The Pan-American Lottery Co.

Has its offices in Asuncion, Paraguay, and all its drawings are held in the lottery building in that city, in the presence of the general public and under the supervision of a manager and inspector appointed by the government.

Its president, General Francisco Villalonga, and the manager, Don Enrique Montes de Leon, are gentlemen of character and known integrity.

The capital stock is $1,000,000, and the number of tickets issued 100,000.

The prizes are more liberal than those of any other lottery company. For example:

| | |
|---|---|
| For $2.00 you can win | $32,000 |
| For $1.00 you can win | 16,000 |
| For 50c. you can win | 8,000 |
| For 25c. you can win | 4,000 |

The Pan American Lottery Company pays 5,733 prizes. No other company in the world distributes so large a number.

In September, 1893, the Pan-American Lottery Company established a general agency in the United States. Today its tickets are known throughout America, and its liberal plan, perfectly square, fair dealing, and the prompt payment of many large prizes sold in the United States, have firmly established it in the public favor.

All prizes sold in the United States are payable in full, without delay, in American money.

The Pan-American Lottery Company has placed its business under the control of general State agents, who will at all times be prepared to pay in full all prizes drawn in the Pan-American lottery.

The general State agents will keep deposits with the following national banks:

77½ Equitable national bank, Cincinnati, Ohio.
Third national bank, St. Louis, Mo.
City national bank, Dallas, Texas.
National Bank of Commerce, Omaha, Neb.
Franklin national bank, New York.
First National Bank of San Francisco, California.

In nearly all towns there are local dealers from whom Pan-American tickets can be obtained, and who will furnish the name and address of the general State agent.

Pan-American Lottery Company,

Asuncion, Parrguay.

Capital stock paid in, $1,000,000.

*Special Features.*

Our general State agents will give constant and careful attention to every detail of the company's business, and will pay, without delay or discount, all Pan-American prizes, thus relieving purchasers of Pan-American tickets of the delay, expense and annoyance of sending prize tickets for collection.

The general State agents will keep deposits with the following national banks:

Equitable national bank, Cincinnati, Ohio.
Third national bank, St. Louis, Mo.
City national bank, Dallas, Texas.
National Bank of Commerce, Omaha, Neb.
Franklin national bank, New York.
First National Bank of San Francisco, California.
Our record in the past is our reference for the future.

| | |
|---|---|
| For $2.00 you can draw | $32,000 |
| For $1.00 you can draw | 16,000 |
| For 50c. you can draw | 8,000 |
| For 25c. you can draw | 4,000 |

No other lottery company offers such chances.

Before the existence of the last lottery law nearly all the great express companies in America, and many of the prominent banks, frequently collected the capital prizes of the Pan-American lottery. Certificates signed by express companies and banks, proving, beyond a doubt, the absolute truth of this statement, can be had by applying to our general State agents throughout the country, or from almost any local dealer.

(Endorsed:) Filed Mar. 22, 1889. S. W. Burnham, clerk.

78 On the same day to wit: the twenty-second day of March, 1899, in the December term of said court, 1898, in the record of proceedings thereof in said entitled cause before the Hon. James G. Jenkins, circuit judge, appears the following entry to wit:

*Order of M'ch 22, 1899, Granting Writ of Habeas Corpus.*

Order of March 22, 1899.

In the Matter of the Petition of C. F. CHAMPION for a Writ of *Habeas Corpus.*

*Petition.*

Now comes the petitioner by his attorneys and files his petition for a writ of *habeas corpus*, and the court having inspected said peti-

tion and the exhibits thereto attached orders that a writ of *habeas corpus* issue forthwith as prayed in said petition.

This cause having come on to be heard upon the motion of said petitioner to be enlarged upon and released from custody pending the determination of his said petition, it is ordered that the said petitioner be enlarged on bail of *habeas corpus* heretofore issued herein until the further order of the court herein, upon his entering in a recognizance in the penal sum of twenty-five hundred dollars ($2,500) and depositing with the clerk of the court as security for his appearance checks on the First National Bank of Chicago, duly certified by such bank in the sum of twenty-five hundred dollars ($2,500) and order that writ of certiorari issue as prayed.

And on the same day to wit: the twenty-second day of March, 1899, there issued out of the clerk's office of said court a certain writ of *habeas corpus*, directed to the marshal of said district to execute, which said writ of *habeas corpus*, together with the return of the marshal thereon endorsed, is in the words and figures following, to wit:

And on the same day, to wit: the twenty-second day of March, 1899, there issued out of the clerk's office a writ of *habeas corpus*, directed to the marshal of said district to execute, which said writ of *habeas corpus*, together with the marshal's return thereon endorsed, is in the words and figures following, to wit:

78½ *Writ of Habeas Corpus, March 22, 1899.*

CIRCUIT COURT OF THE UNITED STATES OF AMERICA, } ss.:
*Northern District of Illinois, Northern Division,* }

The United States of America to John C. Ames, United States marshal for the northern district of Illinois, Greeting:

We command you that you do forthwith without excuse or delay, bring or cause to be brought before the circuit court of the United States of America, for the northern district of Illinois, now sitting in the court-room of said circuit court, in the city of Chicago, in said district, the body of C. F. Champion, by whatever name or addition he is known or called, and who is unlawfully detained in your custody, as it is said, together with the day and cause of his caption and detention, then and there to perform and abide such order and direction as our said circuit court shall make in that behalf. Hereof make due return under the penalty of what the law directs.

To the marshal of the northern district of Illinois to execute.

Witness, the Hon. Melville W. Fuller, Chief Justice of the United States of America, at Chicago, aforesaid, this twenty-second day of March, in the year of our Lord one thousand eight hundred and ninety-nine and of our Independence the 123rd year.

[SEAL.] S. W. BURNHAM, *Clerk.*

(Endorsed:) Gen. No., 25119. "By the *habeas corpus* act." Circuit court United States, northern district of Illinois, northern division. In the matter of the petition of C. F. Champion for a writ of *habeas corpus*. Writ of *habeas corpus*, returnable forthwith. S. W. Burnham, clerk. Joseph B. David, att'y for petitioner.

79 *Return to Writ. Filed M'ch* 24, 1899.

Before the Hon. Peter S. Grosscup, judge.

In the Circuit Court of the United States of America for the Northern District of Illinois, Northern Division.

In the Matter of the Petition of C. F. CHAMPION for a Writ of *Habeas Corpus.*

*Marshal's Return to Writ.*

I, John C. Ames, hereby certify and make return to the writ of *habeas corpus* issued in this case that I am the marshal of the United States for the northern district of Illinois, and that I, on the twenty-first and twenty-second days of March, 1899, held the above-named petitioner in my custody as such marshal by virtue of a commitment issued by Lewis F. Mason, United States commissioner, on March twenty-first, A. D. 1899, which is set forth in full in the petition in this case, and by virtue of a certain order of removal made by the Hon. Christian C. Kohlsaat, as judge of this district, on the twenty-first day of March, A. D. 1899, directing me as such marshal, to forthwith remove the said petitioner herein to the northern district of Texas, in the said United States, and there deliver him to the marshal of that district, to be dealt with according to law, which said order of removal is, also, set forth in full in the said petition.

I do further certify and return that on the said twenty-second day of March, 1899, the said petitioner, C. F. Champion, applied to the Honorable James G. Jenkins, acting circuit judge of the United States court, for a writ of *habeas corpus*, and, on petitioner's motion, the said judge of said court entered an order in said matter, that the said petitioner be enlarged upon bail of *habeas corpus* until the further order of the court in said *habeas corpus* matter, upon his entering in a recognizance in the penal sum of twenty-five hundred dollars ($2,500) and depositing with the clerk of the court as security for his appearance checks on the First National Bank of Chicago, duly certified by such bank, in the sum of twenty-five hundred dollars, with which order the said petitioner complied, and was admitted to bail, pending said proceedings, which order is more fully shown by a copy thereof and the certificate of the clerk hereto attached and marked Exhibit "A."

79½ I do further certify and return that on the said petitioner complying with the terms of said order, I admitted the said petitioner to bail, in conformity with said order.

I do further return that by virtue of the terms of the bail bond

it will become the duty of the said petitioner to appear before the court on the hearing of said *habeas corpus* matter.

I do further certify and return that, as the petitioner is now enlarged upon bail, as aforesaid, it is impossible for me to produce the body of the said petitioner, C. F. Champion, now before your honor, but that it is the duty of the said C. F. Champion there to appear and be, as required by his bail bond.

JOHN C. AMES,
*United States Marshal.*

EXHIBIT A.

*Certified Order of M'ch* 22, 1899.

"EXHIBIT A."

*Order.*

Circuit Court of the United States, Northern District of Illinois, Northern Division.

WEDNESDAY, *March* 22, 1899.

Present: Hon. James G. Jenkins, circuit judge.

In the Matter of the Petition of C. F. CHAMPION for a Writ of *Habeas Corpus.*

This cause having come on to be heard upon the motion of said petitioner to be enlarged upon and released from custody pending the determination of his said petition, it is ordered that the said petitioner be enlarged upon bail of *habeas corpus* heretofore issued herein, until the further order of the court therein, upon his entering in a recognizance in the penal sum of twenty-five hundred dollars ($2,500) and depositing with the clerk of the court as security for his appearance checks on the First National Bank of Chicago, duly certified by such bank in the sum of twenty-five hundred dollars ($2,500), and order for writ of certiorari as prayed.

80 NORTHERN DISTRICT OF ILLINOIS, } ss:
*Northern Division,* }

I, S. W. Burnham, clerk of the circuit court of the United States, for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the order entered of record in said court, on the 22nd day of March, A. D. 1899, in the matter of the petition of C. F. Champion for a writ of *habeas corpus*, as the same appears from the original, and I further certify that the recognizance of said petitioner has been taken and filed and twenty-five hundred dollars ($2,500) in certified checks on First National Bank of Chicago in accordance with said order have been received by me.

In testimony whereof I have hereunto set my hand and affixed

the seal of said court, at my office in Chicago, in said district, this 22nd day of March, A. D. 1899.

[SEAL.] S. W. BURNHAM, *Clerk.*

(Endorsed:) Filed Mar. 24, 1899. S. W. Burnham, clerk.

On the same day, to wit: the twenty-second day of March, 1899, came the petitioner in said entitled cause and filed in the clerk's office of said court a certain recognizance, which said recognizance is in the words and figures following, to wit:

*Recognizance. Filed M'ch* 22, 1899.

Recognizance.

District Court of the United States, Northern District of Illinois, Northern Division.

I, C. F. Champion, principal *and* —, acknowledge myself to be indebted unto the United States of America, in the sum of twenty-five hundred dollars, lawful money of the United States, to be levied of my goods and chattels, lands and tenements, upon this condition:

That I, the said C. F. Champion shall personally be and appear before the circuit court of the said United States for the northern district of Illinois on Friday, March 24, 1899, at 10.30 a. m., before Hon. Peter S. Grosscup from day to day during the present
80½ term thereof, now being holden at the court-house of the said United States, in the city of Chicago, in the northern division of the said district, and from day to day during subsequent terms of the said court, there to abide the order of said court on the writ of *habeas corpus* issued in case number 25119 now pending and undetermined in said court and will abide the order and judgment of the said court in this behalf, and not depart the said court without leave thereof, then this recognizance to be void; otherwise to remain in full force and virtue.

C. F. CHAMPION. [SEAL.]

Subscribed and acknowledged this 22nd day of March, 1899, before me—

S. W. BURNHAM,
*Clerk of U. S. Circuit Court, North. Dist. Illinois.*

Approved this 22d day of March, 1899.

S. W. BURNHAM, *Clerk.*

(Endorsed:) Filed March 22, 1899. S. W. Burnham, clerk.

And on the twenty third day of March, 1899, a writ of certiorari issued out of the clerk's office of said court directed to the marshal to execute, which said writ of certiorari, together with the marshal's return thereon endorsed is in the words and figures following, to wit:

*Writ of Certiorari. Issued M'ch 23, 1899.*

Writ of certiorari.

UNITED STATES OF AMERICA, } ss:
*Northern District of Illinois, Northern Division,* }

The United States of America to Louis F. Mason, Esq, United States commissioner, Greeting:

Whereas it has been made to appear from the petition of C. F. Champion now pending in this court, that you, the said Lewis F. Mason, have in your custody and control certain records and transcripts of proceedings in the case of said C. F. Champion, which are required on the hearing of the petition of said Champion to
81 be discharged under a writ of *habeas corpus* heretofore issued in this court.

We, therefore, command you, Lewis F. Mason, as United States commissioner, that you cause to be transmitted to our circuit court of the United States of America for the northern district of Illinois, at Chicago, in the northern division of said district with all convenient speed, all records and proceedings before you, Lewis F. Mason, as United States commissioner, touching the arrest, apprehension, examination and commitment of the said C. F. Champion and this writ is hereby made returnable at 10.30 o'clock a. m. Friday, March 24, 1899.

To the marshal/ of the northern district of Illinois to execute.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States of America, at Chicago aforesaid, this 23rd day of March in the year of our Lord one thousand eight hundred and ninety-nine, and of our Independence the one hundred and twenty-third year.

[SEAL.] S. W. BURNHAM, *Clerk.*

*Marshal's Return.*

I have served the within writ by reading the same to and within the presence and hearing of Lewis F. Mason, United States comm'r, at the same time giving him a true copy thereof, on the 23rd day of March, 1899.

JOHN C. AMES,
*U. S. Marshal.*
G. H. VOSS, *Deputy.*

(Endorsed:) Filed Mar. 24, 1899. S. W. Burnham, clerk.

And on the twenty-fourth day of March, 1899, in the December term of said court, 1898, in the record of proceedings thereof in said entitled cause before the Hon. James G. Jenkins, circuit judge, appears the following entry, to wit:

*Trial, M'ch* 24, 1899.

Order of March 24, 1899.

In the Matter of the Petition of C. F. CHAMPION for a Writ of *Habeas Corpus.* 25119.

Now again comes the said petitioner by his attorney and the marshal comes also by the district attorney, and it appearing
81½ from the return of said marshal this day filed herein, that said petitioner had been enlarged on bail by entering in a recognizance in the penal sum of twenty-five hundred dollars and depositing with the clerk as security for his appearance checks on the First National Bank of Chicago, duly certified by said bank in the sum of twenty-five hundred dollars in accordance with the order heretofore entered herein, and the motion of said petitioner to be discharged under said writ having been set down to be heard on this day by the Honorable Peter S. Grosscup, circuit judge, and it appearing that said judge is unable to hear the same on account of illness. By agreement of counsel, it is ordered that said writ be made returnable and be heard before his honor Judge Jenkins circuit judge forthwith.

And now comes the petitioner in his own proper person and by counsel, and the marshal comes also by the district attorney and now comes on to be heard the said application of said petitioner to be discharged from custody, and the court having heard the same in part when the hour for adjournment arrived, the further trial of this cause is postponed until Monday next at 2 o'clock p. m.

Afterwards, to wit, on the eleventh day of April, 1899, in the December term of said court, 1898, in the record of proceedings thereof in said entitled cause, before the Honorable James G. Jenkins, circuit judge, appears the following entry, to wit: entered *nunc pro tunc* as of March 24, 1899:

*Order of April* 11, 1899, *Granting Leave to File Amendment to Petition.*

Order giving leave to file amendment to petition.

In the Matter of C. F. CHAMPION. Petition of Writ of *Habeas Corpus.* 25119.

It appearing to the court that on the twenty-fourth day of March, 1899, an amendment to the petition was filed by said Champion in said cause, and the order giving leave to file the same having been made but not appearing of record in said cause, it is hereby ordered that the same be now engrossed on the journal of said court *nunc pro tunc* as of said March 24, 1899.

And on the twenty-fourth day of March, 1899, came the petitioner, by his attorney, and filed in the clerk's office of said court an

amended petition, which said amended petition is in the words and figures following, to wit:

82 *Amended Petition. Filed March* 24, 1899.

Amended petition.

UNITED STATES OF AMERICA, }
*State of Illinois.* }

In the Circuit Court of the United States of America, Northern Division of Illinois.

In the Matter of C. F. CHAMPION.

*Petition for Writ of Habeas Corpus and Writ of Certiorari.*

Amendment to said petition filed herein by leave of court first had and obtained.

Your petitioner further represents unto your honor that said warrant of removal for this petitioner, issued by said Hon. Christian C. Kohlsaat, said judge of said district court, is void because the same does not show upon its face with sufficient certainty that this petitioner is charged with the violation of any offense contrary to the statutes of the United States of America, and said warrant of removal is void because the said warrant of commitment for this petitioner issued by said Lewis F. Mason, said United States commissioner, upon which said warrant of commitment said warrant of removal was issued, is and was void, as said warrant of commitment does not show upon its face that this petitioner was committed to the custody of said United States marshal for any crime, misdemeanor or offence contrary to any statute or law of the United States of America.

This petitioner further represents unto your honor that his detention and imprisonment on said warrant of removal is contrary to law because said warrant of commitment issued by said Lewis F. Mason, said United States commissioner, was issued without jurisdiction of him, the said Lewis F. Mason, as such United States commissioner as the alleged amended complaint filed before said United States commissioner, Lewis F. Mason, was not an amended complaint since the original complaint of the copy filed before said United States commissioner, Lewis F. Mason, was sworn to by a person other and different from the person who executed, made oath and subscribed to said alleged amended complaint, and said United States commissioner, Lewis F. Mason, was without any jurisdiction to conduct any examination of this petitioner touching the

82½ offenses alleged in said alleged amended complaint by reason of the fact that no legal process was ever issued by said United States commissioner, Lewis F. Mason, by which the body of this petitioner was within the lawful jurisdiction of said United States commissioner, Lewis F. Mason.

And for divers other reasons apparent from the record and proceedings of said Lewis F. Mason, said United States commissioner, and said Christian C. Kohlsaat, said judge, which said records are before this honorable court now for inspection, the imprisonment of this petitioner by said John C. Ames, said marshal, is illegal, unjust and contrary to law.

C. F. CHAMPION.

JOSEPH B. DAVID,
*Att'y for Pet'n'r.*

UNITED STATES OF AMERICA, }
*State of Illinois.* }

Before me, S. W. Burnham, clerk of the said circuit court of the United States in and for the northern district of Illinois, personally appeared C. F. Champion, personally known to me to be the same person who subscribed the foregoing amended petition, who being by me first duly sworn on oath says that he has read the foregoing amended petition by him subscribed and knows the contents thereof and the same is true in substance and in fact.

C. F. CHAMPION.

Subscribed and sworn before me this 24th day of March, A. D. 1899.

S. W. BURNHAM,
*Clerk U. S. Circuit Court.*

(Endorsed:) Filed Mar. 24, 1899. S. W. Burnham, clerk.

And on the twenty-seventh day of March, 1899, there *was* filed in the clerk's office of said court a certain transcript of proceedings and copies of papers before Lewis F. Mason, a United States commissioner, which said transcript of proceedings and papers are in words and figures following, to wit:

83 *Minutes of Record of Proceedings.*

Transcript of proceedings and papers before Lewis F. Mason, U. S. commissioner.

UNITED STATES OF AMERICA, }
*Northern District of Illinois.* }

Before me, Lewis F. Mason, a United States commissioner for said district, copy complaint, and affidavit was filed before me on this third day of March, 1899, by S. H. Bethea, United States district attorney and sworn to by S. B. Farish, charging in substance that on or about the 20th day of February, 1899, at Dallas, Texas, in said district, the defendants, W. F. Champion, C. B. Park and C. F. Champion, alias W. W. Ogden in violation of section 5440 of the Revised Statutes of the United States, did unlawfully conspire to commit an offense against the laws of the United States, to wit: did transport lottery tickets etc.

On March 3rd, 1899, issued warrant to John C. Ames, U. S. marshal returnable before —— ——.

On March 22nd, 1899, warrant returned endorsed in substance as follows:

"I have served within warrant by arresting C. F. Champion and have him now before U. S. Commissioner Mason, C. F. Champion and C. B. Park not found.

J. C. AMES,
*U. S. Marshal.*
G. H. VOSS, *Dep'y.*

Fees $10.76."

On March 6th, 1899, issued subpœna for the following witnesses in behalf of U. S.: D. A. Robinson, E. J. Reiley, P. J. Arnold P. H. Nesmith, all of Dallas, Texas, *all of Dallas, Texas.*

On March 13, 1899, said subpœna was returned and indorsed as follows:

"Served on within-named E. J. Riley, P. I. Arnold, P. H. Nesmith, this 10th day of March.

S. H. GREEN,
*U. S. Marshal.*
D. H. ROBINSON, *Dep'y.*

Served on D. A. Robinson this 10th day of March.

S. H. GREEN,
*U. S. Marshal.*

Fees $1.50."

On March 3rd, 1899, defendant, C. F. Champion — brought before me, the said commissioner at my office in the city of Chicago, in said district by G. H. Voss, deputy, U. S. marshal and the complaint was then and there fully read and explained to the said defendant, who thereupon, for plea, said he is "not guilty" as charged in the said complaint.

And thereupon on motion to that effect, made by the defendant, this hearing was continued until the 13th day of March, 1899,
83½ and defendant was required to give bond pending examination in the sum of $1,000.00 which he did do.

On March 13th, 1899, pursuant to the continuance of March 3rd, 1899, defendant C. F. Champion was brought before the commissioner at my office in the said district by G. H. Voss, dep'y U. S. marshal, and the defendant being present, the following witnesses were sworn and examined on the part of the plaintiff, E. J. Riley. Thereupon on motion to that effect made by the plaintiff, this hearing was continued until the 14th day of March, and the said defendant was required to give bond pending examination in the sum of $1,000.00 which he did do.

On March 14th plaintiff filed amended complaint signed by Richard Hudson, charging C. F. Champion with transporting lottery tickets in violation of chapter 191, act of March 2nd, 1895.

On March 14th, in pursuance of continuance of March 13th, de-

fendant C. F. Champion was brought before me, said commissioner at my office in said district, by G. H. Voss, dep'y U. S. marshal and the defendant being present the following witnesses were sworn and examined on the part of the plaintiff, P. I. Arnold, R. Hudson, P. H. Nesmith, D. A. Robinson and upon motion of defendant the hearing was continued until the 21st day of March, at 9.30 a. m.

March 21st, 1899, pursuant to the continuance of March 14, 1899, defendant brought before me by Deputy G. H. Voss, and from the evidence of the said witnesses it appearing to me, the commissioner that the laws of the United States have been violated as charged in the complaint, and that there is probable cause shown to believe the defendant guilty of the alleged offense, it was ordered that he give bond in the sum of $1,000 for his appearance before the United States district court for the northern district of Texas, to be held on the first Monday of April, 1899, at Dallas, Texas, to answer said charge, and that in default of same, he stand committed, and the defendant failing to give said bond was committed to jail in Cook county, Illinois, there to remain until discharged by due course of law.

March 23rd, mittimus returned, endorsed in substance as follows:

"Executed by retaining the within-named defendant in my custody and taking him before the judge of the United States district court who signed a warrant for his removal to the northern district of Texas on the 21st day of March, 1899.

JOHN C. AMES,
*U. S. Marshal,*
By G. H. VOSS,
*Deputy Marshal.*"

I, Lewis F. Mason, do hereby certify that the above and foregoing is a true copy of the minutes of my United States commis-
84 sioner's record of proceedings in criminal cases appearing on page 76 in the case of The United States of America *vs.* W. F. Champion, C. B. Park, C. F. Champion alias W. W. Ogden.

LEWIS F. MASON,
*U. S. Commissioner.*

Dated Chicago, March 23, 1899.

*Affidavit of L. B. Farish.*

UNITED STATES OF AMERICA, }
*Northern District of Texas.* }

Before me, Charles H. Lednum, a United States commissioner for the northern district of Texas, personally appeared this day L. N. Farish, who being by me first duly sworn, deposes and says upon his own knowledge and upon information, received from an official investigation, which he believes to be true and correct, that on or about the 20th day of February, A. D. 1899, at Dallas, Dallas county, Texas, in the northern district of Texas, one W. F. Champion, and one C. B. Park, and one C. F. Champion, alias W. W. Ogden, in

violation of section 5440 of the Revised Statutes of the United States, did unlawfully and wilfully conspire together to commit an offense against the United States laws, to wit: did for the purpose of disposing of the same, transport and cause to be transported and did deposit for the purpose of being tra[illegible]rted from Dallas in the State of Texas to Fresno in the State of [illegible]fornia, one certain box and package of lottery tickets and advertisements and certificates and papers and instruments representing a ticket for a chance and share and interest in and dependent upon the event of a certain lottery called the Pan-American Lottery Company of Paraquay, South America.

2nd count. And the said deponent aforesaid further says under oath upon investigation made as aforesaid that the said W. F. Champion and C. B. Park and C. F. Champion alias W. W. Ogden, did so conspire together to commit an offense against the laws of the United States, to wit: an offense against chapter 191, 28th Statutes at Large, 963, and in pursuance of such conspiracy did unlawfully and wilfully further deposit certain boxes and packages addressed to ten other divers and sundry parties domiciled and living outside of the State of Texas, but in the United States, and then the said W. F. Champion and C. B. Park and C. F. Champion, alias W. W. Ogden, did deposit the said boxes and packages with the Wells, Fargo Express Company in Dallas, Texas, to be transported and carried from the State of Texas, to the various States and Territories of the United States indicated on the said boxes and packages, and the said boxes and packages containing papers,
84½ certificates and instruments purporting to be and representing tickets, chances, shares and interests in and dependent upon the event of a lottery, to wit: the Pan-American Lottery Company of Paraquay, South America, which was then and there offering prizes dependent upon lot and chance and the said conspiracy aforesaid, against the laws of the United States was that the said lottery ticket so transported and carried should be disposed of contrary to the form of statutes in such case made and provided and against the peace and dignity of the United States, and the said W. F. Champion, C. B. Park and C. F. Champion alias W. W. Ogden, are now in the northern district of Texas.

Deponent further says that he has reason to believe and does believe that E. T. Stokes, El Paso, agent of the Wells, Fargo Express Company, Dallas, Richard Rule, Deming, New Mexico, and Richard Hudson, Deming, New Mexico, are material witnesses to the subject-matter in this complaint.

(Signed) L. B. FARISH.

Sworn to before me and subscribed in my presence this 28th day of February, A. D. 1899.

CHARLES H. LEDNUM,
*U. S. Commissioner for the Northern District of Texas.*

I approve this prosecution and the United States commissioner, C. H. Lednum, will issue warrants for arrest of parties.

WM. H. ATWELL, *U. S. Att'y.*

The foregoing has the following endorsement, to wit: United States district court. United States of America *vs.* W. F. Champion *et al.* Affidavit. Filed Feb'y 28, 1899. Chas. H. Lednum, U. S. commissioner.

I hereby certify that the foregoing is a true copy of the original thereof now in my office.

M'ch 1, 1899.

Attest: CHARLES H. LEDNUM,
[SEAL.] *United States Commissioner.*

*Warrant for Apprehension. Issued M'ch* 1, 1899.

The President of the United States of America to the marshal of the United States for the northern district of Texas and to his deputies or any or either of them:

Whereas, L. B. Farish has made complaint in writing under oath before me, the undersigned United States commissioner for
85 the northern district of Texas, charging that W. F. Champion, C. B. Park and one C. F. Champion alias W. W. Ogden, did, on or about the 20th day of February, A. D. 1899, at Dallas, Dallas county, Texas, in said district, in violation of section 5440 of the Revised Statutes of the United States, unlawfully and wilfully conspire together to commit an offense against the laws of the United States, to wit: did transport lottery tickets, etc., contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Now, therefore, you are hereby commanded, in the name of the President of the United States of America to apprehend the said W. F. Champion, C. B. Park and one C. F. Champion alias W. W. Ogden, wherever found in your district and bring their bodies forthwith before me at my office at Dallas, Texas, or any other United States commissioner having jurisdiction of said matter in accordance with law to answer the said complaint that they may then and there be dealt with according to law for the said offense.

Given under my hand and seal, this first day of March, A. D. 1899.

CHAS. H. LEDNUM, [SEAL.]
*United States Commissioner for the*
[SEAL.] *Northern District of Texas.*

Endorsement: United States district court. The United States of America *vs.* W. F. Champion *et al.* Warrant to apprehend. Issued 1 day of March, 1899. Chas. H. Lednum, United States commissioner.

The President of the United States of America to the marshal of the northern district of Illinois:

Whereas, complaint in writing, on oath, has been made to the undersigned, Lewis F. Mason, a United States commissioner for the

district aforesaid, charging that W. F. Champion, C. B. Park and C. F. Champion alias W. W. Ogden, on or about the 20th day of February, A. D. one thousand eight hundred and ninety-nine, at Dallas, Dallas county, within the northern division of the northern district of Texas, did violate the postal laws of the United States, to wit, section 5440 of the Revised Statutes of the United States unlawfully and wilfully conspire together to commit an offense against the laws of the United States, to wit: did transport lottery tickets etc.

Now, therefore, you are hereby commanded, that you take the said W. F. Champion, C. B. Park, C. F. Champion alias W. W. Ogden (if they be found within your said district), and them safely keep, so that you have their bodies forthwith before the un-
85½ dersigned, commissioner as aforesaid, at his office in Chicago, in the said district (or in case of his absence, or inability to act, before any other United States commissioner or judicial officer having jurisdiction), in order that the said W. F. Champion, C. B. Park, C. F. Champion, alias W. W. Ogden may be dealt with according to law. And have you then there this writ, with a return of your doings hereon.

Witness the hand and seal of the said commissioner, at Chicago aforesaid, this third day of March, A. D. one thousand eight hundred and ninety-nine and of the Independence of the said United States the 123 year.

[SEAL.] LEWIS F. MASON,
*U. S. Commissioner.*

*Return to Warrant. Filed M'ch* 3, 1899.

Return.

Received this warrant on the third day of March, 1899, at Chicago, Ills., and executed the same by arresting the within-named C. F. Champion at Chicago, Ills., the 3rd day of March, 1899, and have his body now in court, as within I am commanded.

Dated Chicago, Ill., March 3, 1899.

JOHN C. AMES,
*U. S. Marshal,*
By G. H. VOSS, *Deputy.*

I return this warrant unexecuted as to W. F. Champion and C. B. Park not being able to find them within my district.

*Marshal's Fees.*

1899.

| | | |
|---|---|---|
| Mar. 3. | Travel (in going only) to serve warrant, from Chicago, Ill., to Chicago, Ill., one miles, at 6 cents per mile..... | 06 |
| Mar. 3. | Serving warrant (defendant taken into custody).... | 2 00 |
| Mar. 3. | Mileage—transportation of officer and prisoner 2 miles, 10 cents per mile each..... | 20 |

| | |
|---|---|
| Mar. 3. Discharging defendant (on bond on continuance) to M'ch 13, 14, 21 | 50 |
| Mar. 3, 13, 14, 21. Attendance of deputy, 4 days, before commissioner | 8 00 |
| Total | 10 76 |

(Endorsed:) Filed March 3, A. D. 1899. Lewis F. Mason, U. S. commissioner.

86 *Subpœna. Filed M'ch* 13, 1899.

The United of America to the marshal of the northern district of Texas, Greeting:

We command you, that you summon D. A. Robinson, E. J. Rieley, P. I. Arnold and P. H. Nesmith, if they be found in your district, to be and appear before the undersigned, Lewis F. Mason, a United — commissioner for the northern district of Illinois, at his office in the city of Chicago, in the northern division of said district, on the thirteenth day of March, A. D. 1899, at 10 o'clock a. m., to testify for the plaintiff in the cause wherein The United States of America are plaintiffs, and W. F. Champion, C. B. Park and C. F. Champion defendant-, and this you shall in nowise omit.

Witness the hand and seal of the said commissioner, at Chicago aforesaid, this 6th day of March, A. D. 1899, and of the Independence of the United States the 123 year.

LEWIS F. MASON,
*U. S. Commissioner.*

(Endorsed.)

I have served the within subpœna by reading the same to and in the presence and hearing of E. J. Riley, P. I. Arnold & P. H. Nesmith therein named, this 10th day of March, A. D. 1899.

Marshal's fees, $1.50.

GEO. H. GREEN,
*U. S. Marshal.*
D. A. ROBINSON, *Deputy.*

Filed March 13, A. D. 1899.

LEWIS F. MASON,
*U. S. Commissioner.*

OFFICE OF U. S. MARSHAL,
NORTHERN DISTRICT OF TEXAS.

I certify that I received the within writ on the 10th day of March, '99, at Dallas, Texas, and that I executed the same of the 10th day of M'ch, 1899, at Dallas, Texas, by then and there delivering the within-named D. A. Robinson a copy of this writ.

GEO. H. GREEN,
*U. S. Marshal,*
By —— ——, *Deputy.*

86½ *Bond. Filed M'ch* 3, 1899.

Before Lewis F. Mason, a commissioner of the United States of America for the northern district of Illinois.

NORTHERN DISTRICT OF ILLINOIS, *Northern Division,* } *sct:*

CHICAGO, *March* 2, 1899.

We, C. F. Champion, alias W. W. Ogden, as principal, and N. A. Mayer, of 4250 Drexel Boul., and Leopold Mayer, of 3170 Groveland Ave., as surety, jointly and severally acknowledge ourselves to be indebted unto the United States of America, in the sum of one thousand dollars, lawful money of the said United States, to be levied of our goods and chattels, lands and tenements, upon this condition:

That if the said C. F. Champion, alias W. W. Ogden, shall personally be and appear before Lewis F. Mason, a United States commissioner for the northern district of Illinois, at his office in the city of Chicago, in the northern division of the said district, on the 13th day of March, at 10 o'clock a. m., and from day to day thereafter, then and there to answer to such matters and things as shall be objected against him on behalf of the said United States, for wilful conspiracy with other defendants to commit an offense against the laws of the United States, to wit, did transport lottery tickets, etc., and shall abide the order of said commissioner in that behalf, and not depart from before him without his leave, then this recognizance to be void; otherwise to remain in full force and virtue.

C. F. CHAMPION. [SEAL.]
N. A. MAYER. [SEAL.]
LEOPOLD MAYER. [SEAL.]
—— ——. [SEAL.]

Signed, sealed and acknowledged this 3rd day of March, A. D. 1899, before me—

LEWIS F. MASON,
*United States Commissioner.*

(Endorsed:) Filed March 3, A. D. 1899. Lewis F. Mason, U. S. commissioner.

87 *Justification of Surety. Filed M'ch* 3, 1899.

NORTHERN DISTRICT OF ILLINOIS, *sct:*

On this third day of March, in the year 1899 at the city of Chicago, in the northern district of Illinois, before Lewis F. Mason, a commissioner of the United States of America for the said district, comes N. A. Mayer and offers himself as bail for C. F. Champion, who has been in due form of law brought before the said commissioner, and examined by and before him upon a charge of violating section 5440 R. S. of the U. S. and upon such examination has been by the said commissioner required to give bail in the sum

of one thousand dollars. And thereupon the said N. A. Mayer makes oath and says as follows, to wit:

My name is N. A. Mayer; I reside at 4250 Drexel Boul., Chicago; my occupation is banker; I own in fee-simple, and in my own name and right, the following real estate, situate in the said district, lot 28 Crosby & Sawyer sub. S. ½ sect. 5, T. 37, R. 14, and the deed conveying the same to me has been duly recorded.

The said real estate is free and clear of all liens and incumbrances whatsoever.

I also own personal property, in my own name and right, within the said district, to the value of ten thousand dollars; which personal property is free and clear of all liens and incumbrances whatsoever.

There is no judgment in force against me or my property in any court of record within the said district.

I am not indebted or liable in any manner to exceed five hundred dollars. I am worth at least ten thousand dollars over and above all my liabilities.

I have not acquired, taken or received the title to the said real estate, or any part thereof, or the title to the said personal property, or any part thereof, with any design or intention of making any fraudulent or deceptive showing of my sufficiency as bail in this behalf, or otherwise than in good faith, and with the intention of holding and using the said real estate and personal property as my own.

N. A. MAYER.

Subscribed and sworn before me by the above-named N. A. Mayer, this third day of March, 1899.

LEWIS F. MASON,
*Commissioner.*

(Indorsed:) Filed March 3, 1899. Lewis F. Mason, U. S. commissioner.

87½ *Complaint of Richard Hudson.*

THE UNITED STATES OF AMERICA,
*Seventh Circuit, Northern District of Illinois, Northern Division,* } *sct:*

On this fourteenth day of March, A. D. 1899, at the city of Chicago, in the northern division of the northern district of Illinois, before Lewis F. Mason, a commissioner of the said United States for the said district comes Richard Hudson, of the city of Deming, New Mexico, and upon his oath complains and says that C. F. Champion, late of the city of Dallas, in the northern district of Texas, on or about the 15th day of February, A. D. 1899, at Dallas aforesaid, in the district last aforesaid, unlawfully did cause to be carried and transferred by the Wells, Fargo Express Company from the State of Texas to the Territory of New Mexico, divers tickets in and advertisements of a lottery, to wit: a lottery in the same tickets

and advertisements called the Pan-American lottery and therein described as a lottery then being conducted by the Pan-American Lottery Company with drawings monthly at Asuncion, Paraguay, that is to say one package containing such tickets and advertisements directed to one Samuel Abraham, at Cliffton, Arizona Territory, another package containing such tickets and advertisements directed to S. H. Benson at Wilcox, Arizona Territory, another package containing such tickets and advertisements directed to Paul S. Migel, at San Bernardino, California, and another package containing such tickets and advertisements directed to James A. Ward, at Fresno, California, contrary to the forms of the statutes of the said United States, in such case made and provided, viz: section 1, act of March 2, 1895, 2 Suppl. R. S. U. S., 435.

Wherefore this complainant prays that the said C. F. Champion may be apprehended and further dealt with according to law.

RICHARD HUDSON.

Subscribed and sworn before me by the above-named Richard Hudson the day and year first above written.

LEWIS F. MASON,
*Commissioner.*

[SEAL.]

88 *Mittimus. Filed M'ch* 23, 1899.

The President of the United States of America to the marshal of the northern district of Illinois and to the keeper of the common jail of the county of Cook, in said district, Greeting:

Whereas, C. F. Champion has been apprehended and brought before the undersigned, Lewis F. Mason, a United States commissioner for the district aforesaid, for examination, by virtue of a warrant of the said commissioner issued upon complaint made before him in writing, on oath, charging the said C. F. Champion with transporting lottery tickets, etc.

And whereas, on such examination there appears probable cause to believe the said C. F. Champion guilty of the said offense, and the undersigned, commissioner as aforesaid, has ordered the said C. F. Champion to enter into recognizance, with sufficient surety, in the sum of one thousand dollars, for his appearance for trial on the said charge, at the May term of the district court of the United States for the northern district of Texas, or in default thereof to be committed to jail; and, whereas, the said C. F. Champion has not offered such recognizance: Now, therefore, you, the said marshal, are hereby commanded that you convey the said C. F. Champion to the said jail; and you, the said keeper, are hereby commanded that you receive the said C. F. Champion into the said jail, and him there safely keep until he be discharged therefrom by due course of law.

Witness the hand and seal of the said commissioner, at Chicago aforesaid, in the said division and district, this 21 day of March

A. D. 1899, and of the Independence of the said United States the 123 year.

LEWIS F. MASON,
*U. S. Commissioner.*

[SEAL.]

(Endorsed:) Northern district of Illinois, northern division. Before Lewis F. Mason, U. S. commissioner, *vs.* C. F. Champion. Mittimus. Bail, $1,000. L. F. Mason, U. S. commissioner.

Executed by retaining the within-named defendant in my esutody and taking him before the judge of the United States district court who signed a warrant for his removal to the northern district of Texas on the 21st day of March, 1899.

JOHN C. AMES,
*U. S. Marshal,*
By G. H. VOSS, *Deputy.*

Filed March 23, A. D. 1899.

LEWIS F. MASON,
*U. S. Commissioner.*

88½ *Certificate of U. S. Commissioner.*

UNITED STATES OF AMERICA, } *sct:*
*Northern District of Illinois,* }

I, Lewis F. Mason, United States commissioner for the said district, do hereby certify that the foregoing are true copies of my docket in the case of United States *vs.* C. F. Champion *et al.*, and all papers filed before me and writs issued by me. Which papers are transmitted to the United States circuit court for the northern district of Illinois, in the northern division thereof at Chicago, in obedience to a writ heretofore served upon me commanding me to transmit with all convenient speed all records and proceedings touching the arrest, apprehension, examination and commitment of C. F. Champion.

Dated at the city of Chicago, this 27th day of March, A. D. 1899.

LEWIS F. MASON,
*U. S. Commissioner.*

Fees, $5.00.

(Endorsed:) Filed Mar. 27, 1899. S. W. Burnham, clerk.

And on the sixth day of April, 1899, there was filed in the clerk's office of said court a certain certificate of evidence, which said certificate of evidence is in the words and figures following, to wit:

*Certificate of Evidence. Filed Apr. 6, 1899.*

Certificate of evidence.

In the Circuit Court of the United States of America for the Northern District of Illinois, Northern Division.

In the Matter of the Petition of C. F. CHAMPION for a Writ of *Habeas Corpus.* Gen. No., 25119.

Be it remembered, that on the hearing of the petition of the above-named C. F. Champion, to be released under said writ of *habeas corpus,* in addition to the petition for said writ, and
89 the return of the respondent thereto, there *was* introduced in evidence by the attorney for the United States, the attached exhibits, marked "A," "B," and "C" respectively, Exhibit "A" being the original exhibit and Exhibits "B" and "C" being true and correct copies of the original exhibits.

Witness my hand this sixth day of April, A. D. 1899.

JAS. G. JENKINS,
*Circuit Judge.*

EXHIBIT A.

*Letter.*

EXHIBIT "A."

The following letter found in box addressed to James A. Ward, Fresno, California:

Central department.

Pan-American Lottery Company.

Capital paid in, $1,000,000.00.

DALLAS, TEX., *Feb.* 18, 1899.

James A. Ward, Esq., Fresno, Calif.

DEAR SIR: I desire to call your attention to the enclosed circulars, descriptive of the Pan-American Lottery Company and of its methods of doing business.

I particularly desire to call your attention to the very liberal plan of the company, the large number of prizes, the ample evidences of financial responsibility, and of the prompt payment of all obligations.

We wish some responsible man in your city to handle our tickets, and, after investigation, have concluded to make you a proposition: If you will accept our agency your commission will be twenty-five per cent. You can make your settlement on the day before the drawing, at which time you will cancel all unsold tickets by cutting off the signature in the lower right corner, and you will then return

the canceled tickets to me by express, and at the same time remit for what tickets you have sold, less your commission.

Always seal the box in which you send your settlement.

Send everything by express—I pay all charges.

Knowing your responsibility, and believing you can rapidly build up a good trade in our tickets, I enclose a trial order for our next drawing, and hope you can accept our agency.

If you cannot accept our agency and will induce some responsible acquaintance of yours to accept, we will allow him the
89½ same terms offered you, and to repay you for getting an agent for us, we will, for five consecutive months, send you, free of charge, through the agent you have procured for us, a two-dollar ticket, or that amount in tickets of fractional parts, if preferred by you, for each of our monthly drawings—making a total of $10.00 worth of tickets. You can easily see that it is cheaper for us to do this than to send a traveling man to install an agent.

If you can accept either of the propositions, kindly notify me at once. If you cannot accept either, please return this package by express.

Very truly yours, W. W. OGDEN,
*Room 201 Guild Building, Dallas, Texas.*

EXHIBIT B.

*Copy of Page of Cash Book.*

"EXHIBIT B."

The attached is a fac-simile of a page of a cash book, the cover of which reads as follows:

Pan-American express.

Which cash book was offered in evidence.

| | | | Cash paid. |
|---|---|---|---|
| | | Brought for'd | $389.87 |
| Jan. | 23. | Express | 1.05 |
| " | " | Pacific | .52 |
| " | " | Express | .75 |
| " | 24. | " | .25 |
| " | " | " | .80 |
| " | " | " | .78 |
| " | " | " | .50 |
| " | 25. | " | .50 |
| " | " | " | .25 |
| " | " | " | 1.69 |
| " | 26. | " | 1.00 |
| " | " | " | .75 |
| " | " | " | .25 |
| " | 27. | " | 1.00 |
| " | " | " | .50 |
| | | | $400.46 |

Addition O K. C. F. C.
Settle Jan. 27th, '99.
C. F. C.

90 EXHIBIT C.

*Box and Contents.*

EXHIBIT C.

One box containing lottery tickets, advertisements, etc., with the following writing and printing thereon:

Paid.
James A. Ward,
Fresno, D. A. R.
California.
E. T. Stokes,
Special ag't Treasury Dep't,
El Paso,
Texas.

If not promptly
delivered, return to
W. W. Ogden,
Dallas, Texas.
Wells-Fargo & Co.
Express.

From
Dallas, Tex.

(Endorsed:) Filed Apr. 6, 1899. S. W. Burnham, clerk.

On the same day to wit: the twenty-seventh day of March, 1899, in the December term of said court, 1898, in the record of proceedings thereof in said entitled cause before the Hon. James G. Jenkins, circuit judge, appears the following entry to wit:

*Trial Continued, M'ch* 27, 1899.

Order of March 27, 1899.

In the Matter of the Petition of C. F. CHAMPION for a Writ of *Habeas Corpus.* 25119.

Now again comes the petitioner in his own proper person and by his attorney and the respondent comes also by the United States attorney, and now comes on to be further heard the petition of said relator to be discharged under said writ of *habeas corpus*, and the arguments of counsel being heard in part, when the hour for adjournment arrived the further hearing is postponed until Thursday morning next at 9.30.

Afterwards to wit on the thirtieth day of March, 1899, in the December term of said court, 1898, in the record of proceedings thereof in said entitled cause, before the Hon. James G. Jenkins, circuit judge, appears the following entry to wit:

90½ *Judgment, M'ch* 30, 1899.

Order of March 30, 1899.

In the Matter of the Petition of C. F. CHAMPION for Writ of *Habeas Corpus.* 25119.

Now again comes the petitioner in his own proper person and by his attorney, and the marshal, the respondent herein, comes also by the United States attorney and the court having considered and being now fully advised finds that said petitioner ought to be discharged under said writ.

It is thereupon considered and adjudged by the court that said petitioner, C. F. Champion, be and he is hereby discharged under said writ of *habeas corpus* heretofore issued herein and that he go hence without day.

And it appearing to the court that there has been deposited with the clerk the sum of twenty-five hundred dollars ($2,500) in certified checks on the First National Bank of Chicago as security for the appearance of said C. F. Champion.

It is thereupon further ordered that the clerk return the same to said petitioner and that said recognizance bond be, and the same is hereby discharged.

And now comes the district attorney and prays an appeal which is allowed by the court upon the Government filing its petition for appeal and assignment of errors.

And on the thirty-first day of March, 1899, there was filed in the clerk's office of said court a certain opinion by Judge Jenkins, which said opinion is in the words and figures following, to wit:

91 *Opinion. Filed M'ch* 31, 1899.

Opinion.

UNITED STATES OF AMERICA, *Northern District of Illinois,* } ss:

In the Circuit Court of the United States.

THE UNITED STATES *ex Rel.* C. F. CHAMPION
*v.*
JOHN C. AMES, Marshal. } *Habeas Corpus.*

THURSDAY, *March* 30, 1889.

JENKINS, *Circuit Judge*, orally:

Upon the petition of C. F. Champion, a writ of *habeas corpus* was issued to the marshal of the northern district of Illinois to bring up the body of the petitioner then in his custody that the court might inquire into the cause of arrest and imprisonment. Upon return to the writ it appears that a certified copy of a com-

plaint made to a commissioner in the northern district of Texas was filed with a United States commissioner in this district who thereupon issued a warrant for the arrest of the petitioner; that complaint charged Champion with conspiracy with certain other parties named, to commit an offense against the United States, the overt act alleged being the transportation of certain lottery tickets in the Pan-American Lottery Company of Paraguay.

The petitioner, having been arrested upon that complaint, was brought before the commissioner, whereupon an amended complaint was filed with the commissioner made by Mr. Richard Hudson. That amended complaint abandoned the theory of conspiracy and charged that Champion on the 15th of February, 1899, at Dallas, in the northern district of Texas, did cause to be carried and transported by the Wells-Fargo Express Company, from the State of Texas to the Territory of New Mexico, divers tickets of a drawing in and advertisement of a lottery.

And examination was had upon that complaint, and the prisoner was committed to be transferred to Texas to meet the charge. Upon the hearing of this petition a number of questions have been raised touching the proceedings before the commissioner, including the constitutionality of the act of Congress by which this offense was created. In the disposition of the matters I find it necessary to refer to but two of the questions presented.

I shall not undertake to say to what extent a court upon the hearing on the writ of *habeas corpus* may go into the evi-
91½ dence before the commissioner, but, as I announced upon the hearing, if there is a sufficient charge here, if there is an offense set forth within the act of Congress, I am satisfied that there was shown probable cause to believe that such offense was committed by the petitioner. In considering the constitutionality of this act of Congress I have read the opinion in the case cited, France *v.* United States, 164 U. S., 676, in which the Supreme Court declined to pass upon its constitutionality. I have carefully considered the matter, and I think it fairly a debatable and doubtful question whether the act will be held to be constitutional. But, it being doubtful, it is not for this court, upon the hearing of a petition for a writ of *habeas corpus*, to hold the law unconstitutional. I conceive it to be the duty of a subordinate court, when an act of Congress is of doubtful validity, to hold the law valid for the purposes of the case, leaving the question of the constitutionality to be dealt with by the ultimate tribunal. Therefore, for the purposes of this hearing I shall hold the act of Congress to be constitutional.

This act, 28 Stat., 963, provides "that any person who shall cause to be brought within the United States from abroad for the purpose of disposing of the same, or deposited in, or carried by the mails of the United States, or carried from one State to another in the United States, any paper, certificate or instrument, purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of a lotttery, so-called gift concert, or similar enterprise offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert, or similar

enterprise offering prizes dependent upon lot or chance, to be brought into the United States, or deposited in or carried by the mails of the United States, or transported from one State to another, shall be punishable in the first offense by imprisonment," &c.

It will be perceived that the offense declared here is the causing to be carried these lottery tickets by any means of transportation from one State to any other in the United States. It is claimed that lottery tickets—lotteries being generally prohibited by the laws of the various States—cannot constitute commerce as it is known and as the term is employed in the Constitution of the United States. I am not prepared to say that that contention is well founded, for a prohibited thing may yet be a matter of commerce, and it may be that in the regulation of commerce between the States, under the power conferred by the Constitution Congress has the right to exclude that which it deems prejudicial to public morals, especially when commerce in such matters is already prohibited by the law of the States.

92 The serious difficulty which I have encountered, so far as it is my duty to pass upon the questions presented here, arised upon the complaint itself. I take it that upon the hearing of this petition the court has the undoubted right to look into the complaint, at least so far as to ascertain if an offense is charged, for if none is charged the commissioner has no jurisdiction to issue his warrant or to proceed with the matter. The complaint charges that the defendant caused to be carried and transferred by the Wells-Fargo Express Company, from the State of Texas, to the Territory of New Mexico, certain lottery tickets. The act designates the offense to be the carrying or transferring of such matter from one State to another in the United States. The question to be decided, therefore, is in what sense the word "State" is employed in the act in question. Does it include a Territory of the United States?

At a very early day the question came before the Supreme Court of the United States, Hepburn *v.* Ellzey, 2 Cranch, 445, in regard to the jurisdiction of the Federal courts, the act conferring jurisdiction providing that in order to confer jurisdiction upon the Federal court there must be a controversy between a citizen of one State and a citizen of another State, or between an alien and a citizen. The question arose whether an inhabitant of a Territory of the United States, who was a citizen of the United States, could maintain a suit in the Federal courts, and upon that question we have the decision of the Supreme Court speaking by Mr. Chief Justice Marshall, than whom no greater intellect ever adorned the bench of the Supreme Court of the United States. This decision was made in what might be termed the formative period in the construction of the Constitution at a time when many of its framers were living; and it might be termed a contemporaneous construction of the Constitution. I have also read with great interest and care the several decisions of the district court of Oregon, to which the court here was referred upon the hearing, and the reasoning of those cases has greatly impressed me, for there can be no sort of reason why a citizen of the United States who happens to be an in-

habitant of a Territory should not be allowed access to the Federal courts of his country when an alien has that right; and it has seemed to me that the statute should have been so construed that the word "State" should apply to a Territory of the United States which is under its government and subject to its laws. But the same argument and the same reasoning which induced Judge Deady to hold that the word "State" includes "Territory," was presented to and passed upon by the Supreme Court at that early date in the construction of the Constitution and the Chief Justice remarked: "The act of Congress obviously used the word 'State' in reference to the term as used in the Constitution," and therefore it becomes necessary to ascertain in what sense the word is employed in the Constitution; and "the result of that examination is a conviction that the members of the American Confederacy only are the States contemplated in the Constitution. The House of Representatives is to be composed of members chosen by the people of the several States; and each State shall have at least one Representative. The Senate of the United States shall be composed of two Senators from each State. Each State shall appoint, for the election of an executive, a number of electors equal to its whole number of Senators and Representatives. Those clauses show," says the Chief Justice, "that the word State is used in the Constitution as designating a *number* of the Union, and excludes from the term the signification attached to it by writers on the laws of nations."

92½

It was claimed before that court that other passages from the Constitution showed that the term State was used in a more enlarged sense, but the court observed, on examining the passages quoted that they did not prove what was attempted to be shown by them.

"It is extraordinary," say- the Chief Justice, "that the courts of the United States, which are open to aliens, and to the citizens of every State in the Union, should be closed upon them" when they are citizens and inhabitants of a Territory. "But this is a subject for legislative, not for judicial consideration."

I feel bound by the decision of the Supreme Court to which I have referred, and which has been upheld and adhered to continuously from that time to the present. Hooe *v.* Jamieson, 166 U. S., 395. It is the law of the land today with respect to the jurisdiction of the Federal courts, that the inhabitants of a Territory cannot seek justice within the portals of a Federal court.

Here is an act creating an offense unknown to the common law. It is a cardinal cannon in the construction of criminal statutes that they should be construed strictly; that the courts have no right to extend their meaning beyond the scope of the terms employed, and we must seek for the intent of the law-making power in the language which has been used in the act itself. When Congress, knowing as we must presume it did, that the word "State" as used in the Constitution means simply State and not Territory, knowing also that the act, if it could be upheld at all could only be sustained under the power given to Congress to regulate commerce between the States, employed that term, we must assume that it was in the

constitutional sense as interpreted and declared by the Supreme Court of the United States.

93 It may be said—it may occur to any one to say—that the transportation of lottery tickets into a territory which was under the absolute control of Congress, was as much within the mischief intended to be prevented as the transportation of such tickets from one State to another; but it is no more true than was the powerful argument presented to the Supreme Court that it was not intended to prohibit to citizens of the United States—because they happened to be domiciled in a Territory—the protection of the courts of the United States; and it was as easy a matter in the one case as in the other, as suggested by the Chief Justice, to apply the remedy. If Congress desired to prohibit the transportation of lottery tickets into a Territory of the United States it should have said so.

We may not enlarge the scope of a criminal statute to declare an offense which Congress has not created, because we see that the mischief is the like mischief that Congress has sought to prevent in respect to other geographical divisions of the Union; I have come reluctantly to the conclusion that it would be judicial legislation for the court to hold, in view of the decisions of the Supreme Court, that the word "State" as used in this act includes the Territories of the United States.

It follows, therefore, that this complainant presented to the commissioner charges no offence against this petitioner, and that he must be discharged from imprisonment.

(Endorsed:) Filed March 31, 1899. S. W. Burnham, clerk.

And on the thirty-first day of March, 1899, came the United States by S. H. Bethea, United States attorney, and filed in the clerk's office of said court a certain petition for appeal, which said petition for appeal is in words and figures following, to wit:

93½ *Petition on Appeal. Filed M'ch* 31, 1899.

In the Circuit Court of the United States of America for the Northern District of Illinois, Northern Division, of the March Adjourned Term, 1899.

In the Matter of the Application of C. F. CHAMPION for a Writ of *Habeas Corpus*. Gen. No., —.

Petition on appeal.

The United States, defendant in the above-entitled cause, deeming itself aggrieved by the judgment and order of the court entered in the above-entitled cause on the thirtieth day of March, 1899, hereby appeals from said order and judgment to the United States circuit court of appeals for the seventh circuit, for the reasons specified in the assignment of errors, filed herewith, and it prays that this appeal may be allowed, and that a transcript of the record and

papers on which said order was made, duly authenticated, may be sent to the United States circuit court of appeals for the seventh circuit.

And it further prays that an order may be entered by this court, requiring the said C. F. Champion to enter into a recognizance, with sureties to be approved by the court, in such amount as the court shall think proper, for his appearance answer to the judgment of the said circuit court of appeals for the seventh district, as required by rule thirty-four of the Supreme Court of the United States, promulgated March 29, 1886, as amended May 10, 1886.

Dated, Chicago, Illinois, March 30, 1899.

S. H. BETHEA,
*United States Attorney.*

(Endorsed:) Filed Mar. 31, 1899. S. W. Burnham, clerk.

And on the same day, to wit, the thirty-first day of March, 1899, came the United States by S. H. Bethea and filed in the clerk's office of said court its assignment of errors, which said assignment of errors are in words and figures following, to wit:

94 *Assignment of Errors. Filed M'ch* 31, 1899.

In the Circuit Court of the United States of America for the Northern District of Illinois, Northern Division, of the March Adjourned Term, 1899.

In the Matter of the Application of C. F. CHAMPION for a Writ of *Habeas Corpus.* Gen. No., —.

Assignment of errors.

Now comes S. H. Bethea, attorney for the United States, for the northern district of Illinois, who, for the United States, is about to pray an appeal from the decision and judgment of this court, rendered March 30, 1899, in the above-entitled cause, and assigns the following errors of law in the said decision and judgment:

I.

That by the record aforesaid it appears that the judgment aforesaid given was given for the said petitioner, C. F. Champion, against the said United States, whereas, by the law of the land, the said judgment ought to have been given for the said United States against the said petitioner, C. F. Champion.

II.

The court erred in entering an order and judgment discharging the said C. F. Champion.

III.

The court erred in not entering an order discharging the said writ of *habeas corpus.*

IV.

The court erred in deciding that the complaint filed before the commissioner in said cause did not state a crime of which the United States district court for the northern district of Texas had jurisdiction, when, in fact, it did allege a crime of which said court had jurisdiction.

94 V.

The court erred in holding that the said commissioner, Louis F. Mason, did not have jurisdiction of the subject-matter in the proceedings before him, the said commissioner, set forth in the record herein.

And the said United States prays that the judgment aforesaid may be reversed, annulled and altogether held for nothing.

S. H. BETHEA,
*United States Attorney.*

(Endorsed:) Filed Mar. 31, 1899. S. W. Burnham, clerk.

And on the thirty-first day of March, 1899, in the December term of said court, 1898, in the record of proceedings thereof in said entitled cause before the Hon. James G. Jenkins, circuit judge, appears the following entry, to wit:

*Order of M'ch* 31, 1899, *Allowing Appeal.*

In the Matter of the Application of C. F. CHAMPION for a Writ of *Habeas Corpus.*

And now on this 31st day of March, 1899, comes, in the above-entitled cause, the United States, by its attorney S. H. Bethea, and moves the court for an order granting an appeal herein to the United States circuit court of appeals for the seventh circuit, and asking that, upon the granting of said appeal, the said C. F. Champion, the petitioner, for the writ of *habeas corpus* in said proceeding, be required to enter into a recognizance, with sufficient sureties, for his appearance before the said United States circuit court of appeals for the seventh circuit; and the court having considered this motion, hereby grants said appeal, and doth hereby order that the said petitioner, C. F. Champion, shall, during said appeal, enter into a recognizance, with proper sureties, in the penal sum of five hundred dollars, according to law, for his appearance before the said United States circuit court of appeals for the seventh circuit, at the session thereof appointed to be held on the first Monday of May, 1899, or any adjournment thereof.

95 Afterwards to wit on the twelfth day of April, 1899, in the December term of said court, 1898, in the record of proceedings thereof, in said entitled cause before the Hon. William A. Woods, circuit judge, appears the following entry to wit:

*Order Allowing Deposit in Lieu of Bond.*

In the Matter of the Petition of C. F. CHAMPION for Writ of *Habeas Corpus.*

Now come the parties by their attorneys and it appearing to the court that the said C. F. Champion has deposited with the clerk of this court, a certified check on the First National Bank of Chicago, for the sum of five hundred dollars ($500) as security for his appearance to abide the judgment of the United States circuit court of appeals for the 7th circuit in the matter of the appeal taken by the United States in said above cause, said sum of $500 being deposited in lieu of surety to the recognizance of said C. F. Champion. And it appearing to the court that said C. F. Champion has been unable to furnish such recognizance with security; it is now ordered by the court that the clerk be, and he is hereby authorized to draw the funds on said check upon the First National Bank of Chicago, and deposit the proceeds of the same in the registry of this court, the same to be held in the place and stead of a recognizance by said C. F. Champion with approved security. That said sum of five hundred dollars ($500) shall be subject to any lien for the taxable costs in the said United States circuit court of appeals or in this court and that upon final settlement of the same, any balance remaining shall be returned to the said relator, C. F. Champion.

*Præcipe for Transcript.*

United States Circuit Court, Northern District of Illinois, Northern Division.

In the Matter of the Petition of C. F. CHAMPION for Writ of *Habeas Corpus.* 25119.

The clerk of said court will please make a transcript of the following proceedings had in the above-entitled cause, for use in the United States circuit court of appeals for the seventh circuit:

Petition for writ of *habeas corpus* & writ of certiorari.
Order of March 22, 1899.
Writ of *habeas corpus.*
96 Recognizance.
Writ of certiorari.
Order of March 24, 1899.
Order of April 11, '99, *nunc pro tunc* as of March 24, '99.
Amended petition.
Transcript of proceedings and paper before U. S. commissioner.
Certificate of evidence.
Order of March 27, 1899.
Order of March 30, 1899.
Opinion.
Petition for appeal.

Assignment of errors.
Order of March 31, 1899.
Order of March 12, 1899.

____ ____,
*United States Attorney.*

*Clerk's Certificate.*

NORTHERN DISTRICT OF ILLINOIS, } ss:
*Northern Division,* }

I, S. W. Burnham, clerk of the circuit court of the United States for said northern district of Illinois do hereby certify the above and foregoing to be a true and complete transcript of the record of all the proceedings had in said court in the cause entitled In the matter of the petition of C. F. Champion for a writ of *habeas corpus*, as the same appear from the original files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in the city of Chicago, in said district, this 12th day of April, 1899.

[SEAL.] S. W. BURNHAM, *Clerk.*

97 On the same day, to wit, the twenty-second day of June, 1899, in the December term of said court, 1898, in the record of proceedings thereof in said entitled cause, before the Hon. Christian C. Kohlsaat, district judge, appears the following entry, to wit:

*Order of June 22, 1899.*

In the Matter of the Petition of C. F. CHAMPION for a Writ of *Habeas Corpus.*

Let the writ of *habeas corpus* issue as prayed for, returnable before the Honorable James G. Jenkins, circuit court judge, on Tuesday, the 27th day of June, 1899, at ten o'clock a. m., and the petitioner, C. F. Champion, may be enlarged upon his own recognizance in the sum of one thousand dollars upon depositing with the clerk of this court a certified check on the First national bank for the sum of one thousand dollars or the amount of one thousand dollars in cash for his faithful observance of the condition of his recognizance and for his appearance on said 27th day of June, 1899, and from day to day, as aforesaid, and let the writ of certiorari issue as prayed for, commanding Lewis P. Mason, United States circuit court commissioner, to forthwith produce before this court all his records and proceedings in the case of The United States of America *vs.* Charles F. Champion *et al.*, in which case complaint was filed before said Commissioner Lewis P. Mason on the 9th day of May, 1899.

98 On the same day, to wit, the twenty-second day of June, 1899, a writ of *habeas corpus* issued out of the clerk's office of said court, directed to the marshal of said district to execute;

which said writ of *habeas corpus*, together with the marshal's return thereon endorsed, is in the words and figures following, to wit:

*Writ of Habeas Corpus.*

Circuit Court of the United States of America, Northern District of Illinois, Northern Division, *ss:*

The United States of America to John C. Ames, U. S. marshal northern district of Illinois, Greeting:

We command you that you do, on the twenty-seventh day of June, A. D. 1899, at 10 o'clock a. m., without excuse or delay, bring or cause to be brought before the circuit court of the United States of America for the northern district of Illinois now sitting in the court-room of said circuit court, in the city of Chicago, in said district, the body of C. F. Champion by whatever name or addition he is known or called and who is unlawfully detained in your custody, as it is said, together with the day and cause of his caption and detention, then and there to perform and abide such order and direction as our said circuit court shall make in that behalf. Hereof make due return under the penalty of what the law directs.

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States of America, at Chicago aforesaid, this [SEAL.] twenty-second day of June, in the year of our Lord one thousand eight hundred and ninety-nine, and of our Inde-99 pendence the 123rd year.

S. W. BURNHAM, *Clerk.*

*Marshal's Return.*

Before the Honorable James G. Jenkins, Judge.

In the Circuit Court of the United States of America for the Northern District of Illinois, Northern Division.

In the Matter of the Petition of C. F. CHAMPION for a Writ of *Habeas Corpus.*

I, John C. Ames, hereby certify and make return to the writ of *habeas corpus* issued in this case that I am the marshal of the United States for the northern district of Illinois, and that I, on the twenty-second day of June, 1899, held the above-named petitioner in my custody as such marshal by virtue of a commitment issued by Lewis F. Mason, United States commissioner, on June 22nd, A. D. 1899, which is set forth in full in the petition in this case.

I do further certify and return that on the said twenty-second day of June, 1899, the said petitioner, C. F. Champion, applied to the Honorable Christian C. Kohlsaat, acting circuit judge of the United States, for a writ of *habeas corpus*, and on petitioner's motion the said judge of said court entered an order in said matter that the said petitioner be enlarged upon bail of *habeas corpus* until the

further order of the court in said *habeas corpus* matter upon his entering in recognizance in the penal sum of one thousand dollars ($1,000.00) and depositing with the clerk of said court as security for his appearance a certified check on the First national
100 bank for that amount or the amount in cash, with which order the said petitioner complied and was admitted to bail pending the proceedings, which order is more fully shown by a copy thereof and the certificate of the clerk hereto attached and marked Exhibit "A."

I do further certify and return that on the said petitioner complying with the terms of said order I admitted the said petitioner to bail in conformity with said order.

I do further return that by virtue of the terms of the bail bond it will become the duty of the said petitioner to appear before the court on the hearing of said *habeas corpus* matter.

I do further certify and return that, as the petitioner is now enlarged upon bail, as aforesaid, it is impossible for me to produce the body of the said petitioner, C. F. Champion, now before your honor, but that it is the duty of the said C. F. Champion there to appear and be as required by his bail bond.

JOHN C. AMES,
*United States Marshal.*

(Endorsed:) 858. Gen. No., 25236. "By the *habeas corpus* act." Circuit court, northern district of Illinois, northern division. In the matter of the petition of C. F. Champion for a writ of *habeas corpus*. Returnable June 27, 1899, at 10 a. m. S. W. Burnham, clerk. Joseph B. David, att'y for petitioner. Filed Jun- 27, 1899. S. W. Burnham, clerk.

101 On the same day, to wit, the twenty-second day of June, 1899, a writ of certiorari issued out of the clerk's office of said court, directed to the marshal of the northern district of Illinois to execute; which said writ of certiorari, together with the marshal's return thereon endorsed, is in the words and figures following, to wit:

*Writ of Certiorari.*

UNITED STATES OF AMERICA,
*Northern District of Illinois, Northern Division,* } ss:

The United States of America to Lewis F. Mason, Esq., United States commissioner, Greeting:

Whereas it has been made to appear from the petition of Charles F. Champion for a writ of *habeas corpus*, now pending in this court, that you, the said Lewis F. Mason, have in your custody and control certain records and transcripts of proce-dings in the case of said C. F. Champion, which are required on the hearing of the petition of said Champion to be discharged under a writ of *habeas corpus* heretofore issued in this court:

We therefore command you, Lewis F. Mason, as United States commissioner, that you cause to be transmitted to our circuit court of the United States of America for the northern district of Illinois, at Chicago, in the northern division of said district, with all convenient speed, all records and proceedings before you, Lewis F. Mason, as United States commissioner, touching the arrest, apprehension, examination, and commitment of the said C. F.
102 Champion, and this writ is hereby made returnable at 10 o'clock a. m. Tuesday, June 27, 1899.

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Melville W. Fuller, Chief Justice of
[SEAL.] the United States of America, at Chicago aforesaid, this 22nd day of June, in the year of our Lord one thousand eight hundred and ninety-nine, and of our Independence the one hundred and twenty-third year.

S. W. BURNHAM, *Clerk.*

*Marshal's Return.*

I have served this writ within my district upon the within-named Lewis F. Mason, U. S. commissioner, by reading the same to and within his presence and hearing this 26th day of June, A. D. 1899.

JOHN C. AMES,
*U. S. Marshal,*
By C. W. WATSON, *Deputy.*

(Endorsed:) Filed June 27, 1899. S. W. Burnham, clerk.

103 On the same day, to wit, the twenty-second day of June, 1899, came C. F. Champion and filed in the clerk's office of said court his recognizance in said entitled cause; which said recognizance is in the words and figures following, to wit:

*Recognizance.*

Circuit Court of the United States, Northern District of Illinois, Northern Division.

I, C. F. Champion, acknowledge myself to be indebted unto the United States of America in the sum of one thousand dollars, lawful money of the said United States, to be levied of my goods and chattels, lands and tenements, upon this condition:

That if I, the said C. F. Champion, shall personally be and appear before the circuit court of the said United States for the northern district of Illinois on Tuesday, June 27, 1899, at 10 a. m., Hon. James G. Jenkins presiding, from day to day during the present term thereof, now being holden at the court-house of the said United States, in the city of Chicago, in the northern division of the said district, and from day to day during subsequent terms of the said court, there to abide the order of said court on the writ

of *habeas corpus* issued in cause No. 25236, entitled "In the matter of the petition of C. F. Champion for a writ of *habeas corpus*," now pending and undetermined in said court, and will abide the order and judgment of the said court in this behalf and not depart the said court without leave thereof, then this recognizance to be void; otherwise to remain in full force and virtue.

CHARLES F. CHAMPION. [SEAL.]

Subscribed and acknowledged this 22nd day of June, 1899, before me—

S. W. BURNHAM,
*Clerk U. S.* District *Court, North. Dist. Illinois.*

Approved this 22nd day of June, 1899.

S. W. BURNHAM, *Clerk.*

104 (Endorsed:) No. 25236. Circuit court of the United States, northern district of Illinois. *In re* petition of C. F. Champion for writ of *habeas corpus*. Recognizance of C. F. Champion. Filed June 22, 1899. S. W. Burnham, clerk.

105 And on the twenty-seventh day of June, 1899, there was filed in the clerk's office of said court a certain transcript of proceedings had before Lewis F. Mason, a United States commissioner; which said transcript of proceedings *are* in words and figures following, to wit:

UNITED STATES OF AMERICA, }
*Northern District of Illinois.* }

UNITED STATES OF AMERICA
*vs.*
C. F. CHAMPION, alias W. W. OGDEN, W. F. CHAMPION, and C. B. Park. } 25236.

*Transcripts before Lewis F. Mason, U. S. Commissioner.*

106 UNITED STATES OF AMERICA, }
*Northern District of Illinois,* } *ss:*

UNITED STATES OF AMERICA
*vs.*
C. F. CHAMPION, alias W. W. OGDEN, W. F. CHAMPION, Charles B. Park, Defendants. } No. 53.

Before me, Lewis F. Mason, a United States commissioner for the said district, *complainant* an affidavit was made on this 9th day of May, 1899, by G. H. Voss, deputy United States marshal, charging in substance that on or about the 1st day of February, 1899, at Dallas, Texas, in the said district, the defendants, C. F. Champion, alias W. W. Ogden, W. F. Champion, Charles B. Park, in violation of section 5440 of the Revised Statutes of the United States, did

unlawfully conspire to commit a crime against the United States, to wit, carried lottery tickets from one State to another, in violation of law.

On May 10th, 1899, issued warrant to J. C. Ames, United States marshal, returnable before me.

On May 10th, 1899, warrant returned endorsed in substance as follows; "Served within warrant by arresting C. F. Champion, alias W. W. Ogden, W. F. Champion and C. B. Park not found, and I have C. F. Champion now before U. S. Commission- Mason.—J. C. Ames, U. S. marshal, by C. W. Watson, deputy. Fees, $23.06."

On May 10th, 1899, issued subpœna on behalf of U. S. — G. H. Voss, deputy U. S. marshal.

On May 10th, 1899, said subpœna was returned endorsed in substance as follows: "Served within subpœna by reading to G. H. Voss this 10th day of May, 1899.—J. C. Ames, U. S. marshal, by C. W. Watson, deputy. Fees, 56c."

On May 10th, 1899, defendant C. F. Champion was brought
107 before me, the said commissioner, at my office, in the city of Chicago, in said district, by C. W. Watson, deputy U. S. marshal, and complaint was then and there fully read and explained to the said defendant, who thereupon for plea said he is not guilty as charged in the said complaint, and thereupon, on motion to that effect made by the defendant, this hearing was continued until the 17th day of May, 1899, and the said defendant was required to give bond pending examination in the sum of one thousand dollars, which he did.

On May 17th, 1899, pursuant to continuance of May 10th, 1899, defendant was brought before me, the said commissioner, at my said office, in the said district, by C. W. Watson, deputy U. S. marshal, and thereupon, upon motion to that effect made by the defendant, this hearing was continued until the 26th day of May, 1899, and the defendant was required to give bond in the sum of one thousand dollars, which he did.

On May 26th, 1899, pursuant to the continuance of May 17th, 1899, the defendant was brought before me, the said commissioner, at my office, in the said district, by C. W. Watson, deputy U. S. marshal, and thereupon, on motion to that effect made by the plaintiff, this hearing was continued until the 17th day of June, 1899.

On June 17th, 1899, pursuant to continuance of May 26th, 1899, the defendant was brought before me, the said commissioner, at my office, by C. W. Watson, deputy U. S. marshal. The following witnesses *were* sworn on the part of the plaintiff: G. H. Voss.

And from the evidence of the said witness it appearing to me, the commissioner, that the laws of the United States have been violated as charged in the complaint, and that there is probable cause shown to believe the defendant guilty of alleged offense, it is ordered that he give bond in the sum of one thousand dollars for his
108–192 appearance before the United States district court of the northern district of Texas, to be held on the first Monday in January, 1900, at Dallas, Texas, to answer said charge, and that in the default of same he stand committed, and the defendant, fail-

ing to give said bond, was committed to the jail of Cook county, Illinois, there to remain until discharged by due course of law.

June 22nd, 1899, mittimus returned endorsed as follows:

I have executed this writ by detaining the within-named Chas. F. Champion in my custody until 11 o'clock a. m., June 22nd, when he gave bond before the clerk of the U. S. circuit court, at Chicago, when he was released.—John C. Ames, U. S. marshal, by C. W. Watson, deputy.

UNITED STATES OF AMERICA, } ss:
*Northern District of Illinois,* }

I, Lewis F. Mason, United States commissioner for the northern district of Illinois, do hereby certify that the foregoing three pages are true copies of my docket in the case of The United States of American *vs.* C. F. Champion *et al.*, and all papers are true copies of all papers filed before me and writs issued by me pertaining to the said cause; which papers are transmitted to the United States circuit court for the northern district of Illinois, in the northern district thereof, at Chicago, in obedience to a writ heretofore served upon me, commanding me to transmit with all convenient speed all records and proceedings touching the arrest, apprehension, examination, and commitment of C. F. Champion, alias W. W. Ogden.

Dated at the city of Chicago this 26th day of June, A. D. 1899.

LEWIS F. MASON,
*United States Commissioner.*

193 The United States of America to the marshal of the northern district of Illinois, Greeting:

We command you that you summon G. H. Voss, if he be found in your district, to be and appear before the undersigned, Lewis F. Mason, a United States commissioner for the northern district of Illinois, at his office, in the city of Chicago, in the northern division of said district, on the 17th day of May, A. D. 1899, at 10 o'clock a. m., to testify for the United States in the cause wherein The United States of America are plaintiffs and C. F. Champion *et al.* defendant-; and this you shall in nowise omit.

Witness the hand and seal of the said commissioner, at
[SEAL.] Chicago aforesaid, this 10 day of May, A. D. 1899, and of the Independence of the United States the 123 year.

LEWIS F. MASON,
*U. S. Commissioner.*

194–196 Before Lewis F. Mason, a Commissioner of the United States of America for the Northern District of Illinois.

CHICAGO, *May* 10, 1899.

NORTHERN DISTRICT OF ILLINOIS, } sct:
*Northern Division,* }

I, C. F. Champion, acknowledge myself to be indebted unto the United States of America in the sum of one thousand dollars, lawful

money of the said United States, to be levied of my goods and chattels, lands and tenements, upon this condition:

That if the said C. F. Champion shall personally be and appear before Lewis F. Mason, a United States commissioner for the northern district of Illinois, at his office, in the city of Chicago, in the northern division of the said district, on the 17 day of May, at 10 o'clock a. m., and from day to day thereafter, then and there to answer such matters and things as shall be objected against him on behalf of the said United States for violating section 5440, as amended, & act of March 3, 1895, and shall abide the order of said commissioner in that behalf and not depart from before him without his leave, then this recognizance to be void; otherwise to remain in full force and virtue.

(Signed) C. F. CHAMPION. [SEAL.]

Signed, sealed, and acknowledged this 10 day of May, A. D. 1899, before me—

LEWIS F. MASON,
*United States Commissioner.*

True copy.
LEWIS F. MASON,
*U. S. Commissioner.*

(Endorsed:) No. 53. Northern district of Illinois, northern division. Before Lewis F. Mason, U. S. commissioner. The United States of America *vs.* Champion *et al.* Recognizance on continuance. Filed May 10, A. D. 1899. Lewis F. Mason, U. S. commissioner.

197 On the same day, to wit, the twenty-seventh day of June, 1899, in the December term of said court, 1898, in the record of proceedings thereof in said entitled cause, before the Hon. James G. Jenkins, circuit judge, appears the following entry, to wit:

In the Matter of the Petition of CHARLES F. CHAMPION for a Writ of *Habeas Corpus.* 25236.

And now comes the petitioner in his own proper person and by his attorneys, and the United States marshal, John C. Ames, the respondent herein, comes also by the United States attorney, and the court, having considered and being now fully advised, finds that the petitioner ought not to be discharged under said writ.

It is therefore considered and adjudged by the court that said writ of *habeas corpus* be discharged and said petitioner, Charles F. Champion, be, and he is hereby, remanded to the custody of John C. Ames, United States marshal for the northern district of Illinois.

198 On the same day, to wit, the twenty-seventh day of June, 1899, came Charles F. Champion, by his attorneys, and filed in the clerk's office of said court his petition for appeal; which said petition for appeal is in words and figures following, to wit:

UNITED STATES OF AMERICA, } ss:
*Northern District of Illinois,* }

In the Circuit Court of the United States for the Northern District of Illinois, Northern Division, Adjourned May Term, A. D. 1899.

In the Matter of the Petition of CHARLES F. CHAMPION for a Writ of *Habeas Corpus.* No. 25236.

*Petition on Appeal.*

Charles F. Champion, petitioner in the above-entitled cause, deeming himself aggrieved by the judgment and order of the court entered in the above-entitled cause on the 27th day of June, 1899, hereby appeals from said order and judgment to the Supreme Court of the United States for the reasons specified in the assignment of errors filed herewith, and he prays that this appeal may be allowed, and that a transcript of the record and papers on which said order and judgment were made, duly authenticated, may be sent to the Supreme Court of the United States; and he further prays that an order may be entered by this court allowing him to be enlarged on a recognizance in such sum and on such conditions as may be approved by the court for his appearance to abide the judgment of the Supreme Court of the United States.

Dated this 27th day of June, 1899.

CHARLES F. CHAMPION, *Petitioner.*

JOSEPH B. DAVID AND
MORITZ ROSENTHAL,
*Attorneys for said Petitioner.*

(Endorsed:) Filed June 27, 1899. S. W. Burnham, clerk.

199 On the same day, to wit, the twenty-seventh day of June, 1899, came Charles F. Champion, by his attorneys, and filed in the clerk's office of said court his assignment of errors; which said assignment of errord are in words and figures following:

UNITED STATES OF AMERICA, } ss:
*Northern District of Illinois,* }

In the Circuit Court of the United States for the Northern District of Illinois, Northern Division, Adjourned May Term, A. D. 1899.

In the Matter of the Petition of CHARLES F. CHAMPION for a Writ of *Habeas Corpus.* No. 25236.

*Assignment of Errors.*

Now comes the petitioner, Charles F. Champion, by Joseph B. David and Moritz Rosenthal, his attorneys, and said petitioner having prayed for and obtained an appeal from the decision and judg-

ment of this court, rendered on the 27th day of June, 1899, in the above-entitled cause, assigns the following errors of law in said decision, order, and judgment:

1. By the record aforesaid it appears that the judgment aforesaid was given for the respondent and against the petitioner, whereas, by the law of the land, said judgment ought to have been given for said petitioner, Charles F. Champion, and against the said respondent.

2. The court erred in entering an order and judgment discharging the writ of *habeas corpus* and remanding petitioner to the custody of the respondent.

200 3. The court erred in not entering an order discharging petitioner upon said writ of *habeas corpus*.

4. The court erred in not holding and finding that that portion of section 1 of the act of March 2, 1895, 2 Supp. R. S. U. S., 435, which makes it an offense to carry from one State to another in the United States any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise offering prizes dependent upon lottery chance, or shall cause any advertisement of such lottery, so-called gift concert, or similar enterprise offering prizes dependent upon lottery chance to be transferred from one State to another in the United States, is unconstitutional and void and in violation of the first amendment of the Constitution of the United States.

5. The court erred in not finding that the Congress of the United States was not empowered under and by virtue of paragraph 3 of section 8 of article 1 of the Constitution of the United States to pass and enact that portion of section 1 of the act of March 2, 1895, 2 Supp. R. S. U. S., 435, which made it an offense to carry from one State to another in the United States any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise offering prizes dependent upon lottery chance, or shall cause any advertisement of such lottery, so-called gift concert, or similar enterprise offering prizes dependent upon lottery chance to be transferred from one State to another in the United States.

6. The court erred in not finding and deciding that it was beyond the power of Congress to pass and enact that part of section

201 1 of the act of March 2, 1895, 2 Supp. R. S. U. S., 435, which made it an offense to carry from one State to another in the United States any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise offering prizes dependent upon lottery chance, or shall cause any advertisement of such lottery, so-called gift concert, or similar enterprise offering prizes dependent upon *literary* chance to be transferred from one State to another in the United States, and that that portion of said statute was unconstitutional, null, and void.

7. The court erred in holding that the commissioner, Lewis F.

Mason, had jurisdiction of the subject-matter in the proceedings before him, said commissioner, as set forth in the record herein.

8. The court erred in finding that said commissioner, Lewis F. Mason, was authorized and warranted in finding that the offense of conspiracy, as charged in the complaint filed before said commissioner, was committed, and that said commissioner was warranted in finding that there was probable cause for believing that said petitioner, Charles F. Champion, was guilty of said offense of conspiracy.

9. The court erred in finding that there was any evidence before the court that the offence of conspiracy had been committed as charged in the complaint filed before said commissioner, Lewis F. Mason, or that there was any evidence or ground for holding or finding that said petitioner, Charles F. Champion, was probably guilty of said offense of conspiracy, as charged in said complaint and the indictment offered in evidence before said commissioner and made a part of said complaint.

10. The court erred in finding that said petitioner should not be discharged upon said writ of *habeas corpus* for the reasons set forth in the petition of said petitioner, alleging that he was un-
202 lawfully restrained of his liberty by the respondent, John C. Ames, United States marshal.

11. The court erred in not discharging said petitioner upon said writ of *habeas corpus*, upon the ground that there was no evidence or testimony offered before the commissioner or before the court showing that the crime of conspiracy had been committed, as charged in the complaint filed before said commissioner, or, if committed, that there was no evidence showing or tending to show that said petitioner was probably guilty of said offense.

12. The court erred in not finding that there was no evidence upon which the petitioner could be convicted upon said indictment in the district court of the United States for the northern district of Texas in case the said petitioner was placed upon trial upon said indictment.

And the said petitioner prays that the judgment and order aforesaid of said circuit court of the United States for the northern district of Illinois, northern division, may be reversed, set aside, annulled, and altogether held for nothing.

CHARLES F. CHAMPION,
By JOSEPH B. DAVID &
MORITZ ROSENTHAL,
*His Attorneys.*

JOSEPH B. DAVID AND
MORITZ ROSENTHAL,
*Att'ys for Charles F. Champion.*

(Endorsed:) Filed June 27, 1899. S. W. Burnham, clerk.

203 On the same day, to wit, the twenty-seventh day of June, 1899, in the December term of said court, 1898, in the record

of proceedings thereof in said entitled cause, before the Hon. James G. Jenkins, circuit judge, appears the following entry, to wit:

*Order.*

Circuit Court of the United States, Northern District of Illinois, Northern Division.

TUESDAY, *June* 27, 1899.

Present: Hon. James G. Jenkins, circuit judge.

In the Matter of the Petition of CHARLES F. CHAMPION for a Writ of *Habeas Corpus*. No. 25236.

And the said petitioner, Charles F. Champion, in his own proper person and by his attorneys, having this day filed his petition praying an appeal to the Supreme Court of the United States from the order and judgment of this court discharging the writ of *habeas corpus* and remanding the said Charles F. Champion to the custody of John C. Ames, United States marshal for the northern district of Illinois, and said Charles F. Champion having this day filed with his said petition for appeal to the Supreme Court of the United States his assignment of errors, in accordance with the rules of the Supreme Court of the United States:

It is therefore ordered by the court that the said appeal of said Charles F. Champion to the Supreme Court of the United States be, and the same is hereby, allowed, upon condition that said petitioner, Charles F. Champion, enter into a recognizance in the sum of one thousand dollars, with sufficient surety, to be approved by the clerk of this court, conditioned upon his personally appearing before the
Supreme Court of the United States on the first day of the
204 next term thereof, to be held in the city of Washington, D. C.,
and from day to day thereafter, to abide the final order and judgment of said Supreme Court of the United States on said appeal, or, in lieu thereof, that said petitioner deposit the sum of one thousand dollars cash with the clerk of this court as security for his recognizance.

And it appearing to the court that said petitioner heretofore deposited the sum of one thousand dollars with the clerk of this court as security for his appearance to abide the judgment of this court on said writ of *habeas corpus*:

It is ordered that said one thousand dollars may be retained by the clerk of this court in lieu of the one thousand dollars to be deposited as security for his recognizance, to abide the order and judgment of the Supreme Court of the United States upon said petitioner's appeal from the judgment of this court.

And it is further ordered that the recognizance heretofore given by said petitioner for his appearance to abide the judgment of this court on said writ of *habeas corpus* is hereby discharged.

205 On the same day, to wit, the twenty-seventh day of June, 1899, there was filed in the clerk's office of said court a

certain certificate made by Judge James G. Jenkins; which said certificate is in the words and figures following, to wit:

*Certificate of Judge.*

UNITED STATES OF AMERICA, *Northern District of Illinois,* } ss:

In the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

In the Matter of the Petition of CHARLES F. CHAMPION for a Writ of *Habeas Corpus.* No. 25236.

I, James G. Jenkins, one of the judges of the circuit court of the United States for the seventh judicial circuit, do hereby certify that upon the hearing of the above cause the construction and application of the first amendment to the Constitution of the United States was fairly raised by the petition of said petitioner for a writ of *habeas corpus*, and was argued upon the hearing of the same, and was by me determined.

And I do further certify that the application of clause 3 of section 8 of article 1 of the Constitution of the United States was fairly raised by the petition of said petitioner for a writ of *habeas corpus*, and was argued upon the hearing of the same, and was by me determined;

And that the power of the Congress of the United States to pass section 1 of the act of March 2, 1895, 2 Supp. R. S. U. S., 435, was fairly raised by the petition of said petitioner for a writ of *habeas corpus*, and was argued upon the hearing of the same, and was by me determined;

206 And that the constitutionality of section 1 of the act of March 2, 1895, 2 Supp. R. S. U. S., 435, was involved in said above cause, and was argued by the respective counsel upon the hearing of the same, and was by me determined.

JAS. G. JENKINS.

June 27, 1899.

(Endored:) Filed June 27, 1899. S. W. Burnham, clerk.

207 On the same day, to wit, the twenty-seventh day of June, 1899, there was filed in the clerk's office of said court a certain certificate by Judge Jenkins; which said certificate is in the words and figures following, to wit:

*Certificate.*

UNITED STATES OF AMERICA, *Northern District of Illinois,* } ss:

In the Circuit Court of the United States for the Northern District of Illinois, Northern Division. Adjourned May Term, A. D. 1899.

In the Matter of the Petition of CHARLES F. CHAMPION for a Writ of *Habeas Corpus.* No. 25236.

I, James G. Jenkins, one of the judges of the circuit court of the United States in and for the seventh judicial circuit, before whom the above-entitled cause was heard, do hereby certify that the said above cause was heard upon the petition of the petitioner, the return of the marshal thereto, the writ of certiorari, and the certified copy of the proce-dings before Lewis F. Mason, United States commissioner, and the arguments of the respective counsel, and nothing else.

JAS. G. JENKINS.

June 27, 1899.

(Endorsed:) Filed June 27, 1899. S. W. Burnham, clerk.

208 On the sixth day of July, 1899, there was filed in the clerk's office of said court in said entitled cause a certain opinion by Judge Jenkins; which said opinion is in the words and figures following, to wit:

*Opinion.*

United States Circuit Court, Northern District of Illinois.

In the Matter of the Petition of C. F. CHAMPION for a Writ of *Habeas Corpus.* No. 25236.

JENKINS, *Circuit Judge:*

First. For the purposes of this hearing upon the writ of *habeas corpus*, I hold that the act of 1895, entitled "An act for the suppression of lottery traffic through national and interstate commerce and the postal service, subject to the jurisdiction and laws of the United States," being chap. 191 of the Laws of 1895, 28th Stat., page 963, is constitutional and valid with reference to the provision prohibiting transportation of lottery tickets from one State into another.

Second. That the indictment found in the United States district court for the northern district of Texas which was offered in evidence before the commissioner upon the examination of Champion properly exhibits and charges an offense against the United States under section 5440 of the Revised Statutes.

Third. It was conceded by counsel upon both sides, and I therefore hold, for the purposes of this case, that that indictment so

offered in evidence before the commissioner established *prima facie* that the offense charged had been committed. It would have been sufficient for the Government to have rested its case before
209 the commissioner with respect to the commission of the offense upon this *prima facie* showing. That the prosecuting attorney went further and established by oral evidence the commission of an overt act in no way impairs the force and effect of the indictment as *prima facie* evidence of the conspiracy charged.

Fourth. I am of opinion that the evidence produced before the commissioner sufficiently identified the petitioner here, C. F. Champion, as the person charged in the indictment.

Fifth. There being, therefore, a *prima facie* case made with respect to the offense and the identity of the defendant, and no evidence opposing, I think the commissioner was warranted in holding the prisoner for transfer to the proper district for trial under indictment.

(Endorsed:) Filed July 6, 1899. S. W. Burnham, clerk.

210 And on the fourteenth day of July, 1899, came C. F. Champion and filed in the clerk's office of said court his recognizance; which said recognizance is in the words and figures following, to wit:

*Recognizance of Charles F. Champion.*

Circuit Court of the United States, Northern District of Illinois, Northern Division.

I, Charles F. Champion, do acknowledge myself to be indebted unto the United States of America in the sum of one thousand dollars, lawful money of the said United States, to be levied of our goods and chattels, lands and tenements, upon this condition:

That if the said Charles F. Champion shall personally be and appear before the Supreme Court of the said United States upon the first day of the next term thereof and from day to day during subsequent terms of the said court, there to answer to such matters and things as shall be objected against him on behalf of the said United States, and shall abide the order and judgment of the said court in that behalf, and not depart the said court without leave thereof, then this recognizance to be void; otherwise to remain in full force and virtue.

C. F. CHAMPION. [SEAL.]

Subscribed and acknowledged, this 14th day of July, 1899, before me—

S. W. BURNHAM,
*Clerk U. S. District Court, North. Dist. Illinois.*

Approved this 14th day of July, 1899.

S. W. BURNHAM, *Clerk.*

(Endorsed:) Filed July 14, 1899. S. W. Burnham, clerk.

211 Afterwards, to wit, on the fourteenth day of July, 1899, there was filed in the clerk's office of said court a certain waiver of citation by S. H. Bethea, United States attorney; which said waiver of citation is in words and figures following, to wit:

*Waiver of U. S. Dist. Att'y of Citation on Appeal.*

UNITED STATES OF AMERICA, } ss.:
*Northern District of Illinois,* }

In the Circuit Court of the United States, Northern District of Illinois, Northern Division, May Adjourned Term, 1899.

In the Matter of the Petition of CHARLES F. CHAMPION for Writ of *Habeas Corpus.*

I, S. H. Bethea, United States district attorney for the northern district of Illinois, do hereby certify that I appeared as attorney for the respondent, John C. Ames, United States marshal for the northern district of Illinois, in said above cause upon the hearing of the same, and I further certify that I have received notice of the perfecting of the appeal from the decision of said circuit court to the Supreme Court of the United States discharging the writ of *habeas corpus* and remanding petitioner to the custody of said Ames, and I hereby waive any notice of any citation or service of any summons or citation of or upon said appeal.

S. H. BETHEA, *U. S. Att'y.*

Chicago, July 13, 1899.

(Endorsed:) Filed July 14, 1899. S. W. Burnham, clerk.

212 NORTHERN DISTRICT OF ILLINOIS, } ss.:
*Northern Division,* }

I, S. W. Burnham, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the record of all the proceedings had in said court in the cause entitled In the matter of the petition of Charles F. Champion for a writ of *habeas corpus*, as the same appear from the original records and files of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office, in the city of Chicago, in said district, this 18th day of July, 1899.

[Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.]

S. W. BURNHAM, *Clerk.*

213 In the Supreme Court of the United States, October Term, A. D. 1899.

| | |
|---|---|
| CHARLES F. CHAMPION, Appellant, *vs.* JOHN C. AMES, Appellee. | Appeal from the Circuit Court of the United States, Northern District of Illinois, Northern Division. |

It is hereby stipulated by and between the parties to the above-entitled cause that the clerk of said Supreme Court in printing the record may omit all matter in such record which is a transcript of the proceedings before the United States commissioner, Lewis F. Mason, in so far as the same is a repetition of the matter and exhibits contained in the petition for writ of *habeas corpus* and certiorari filed in said circuit court of the United States, and where such matter is a repetition it may be simply referred to in the printed record.

And it is further stipulated that the clerk of said Supreme Court may use as a part of the record to be printed by him the printed record used in the circuit court of appeals for the seventh circuit; which printed record is a part of the transcript of the record filed in this cause.

S. H. BETHEA, *U. S. Att'y.*
MORITZ ROSENTHAL &
JOSEPH B. DAVID,
*Att'ys for Appellant.*

214 *Matter in Record that is Duplicated.*

(1.) Complaint, Rec., page- 109–118, which is a repitition of p. 14–23.

(2.) Indictment, Rec., page- 119–146—repitition of p. 26–53.

(3.) Transcript of record circuit court of appeals, Rec., p. 144–190—repitition of p. 54 to 96.

(4.) Warrant of commitment, Rec., p. 195, 196—repitition of p. 12, 13.

(5.) Warrant of apprehension, Rec., p. 191, 192—repitition of p. 24, 25.

[Endorsed:] Supreme Court of the United States. Charles F. Champion *et al.* appellant-, *vs.* John C. Ames, appellee. Stipulation on printing of record.

215 [Endorsed:] File No., 17,474. Supreme Court U. S., October term, 1899. Term No., 360. Chas. F. Champion, app't, *vs.* Jno. C. Ames, U. S. marshal. Stipulation as to printing record. Filed July 25, 1899.

Endorsed on cover: File No., 17,474. N. Illinois C. C. U. S. Term No., 360. Charles F. Champion, appellant, *vs.* John C. Ames, United States marshal. Filed July 25th, 1899.

# (18,111.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1901.

No. 293.

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JOHN FRANCIS, ANTHONY HOFF, AND JOHN EDGAR, ALIAS PETER EDGAR, PETITIONERS,

*vs.*

THE UNITED STATES.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPFALS FOR THE SIXTH CIRCUIT.

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# TRANSCRIPT OF RECORD.

The United States of America, Southern District of Ohio, Western Division, ss.:

At a stated term of the District Court of the United States of America, within and for the Western Division of the Southern District of Ohio, in the Sixth Judicial Circuit of the United States of America, begun and had in the court rooms at the city of Cincinnati, Ohio, in said district, on the first Tuesday of April, being also the third day of that month in the year of our Lord, nineteen hundred and of the American Independence the one hundred and twenty-fourth.

Present, the Honorable Albert C. Thompson, District Judge.

Among the proceedings had, were the following, to wit:

| | |
|---|---|
| The United States, Plaintiff, | |
| vs. | Criminal. |
| Charles W. Reilley, John Francis, Anthony Hoff and John Edgar, alias Peter Edgar, Defendants. | No. 377. |

Be it remembered, That heretofore, to wit: On the sixth day of October, in the year of our Lord one thousand eight hundred and ninety-nine, came the Grand Jurors of the United States of America, within and for the Southern District of Ohio, and presented to the court here, their certain bill of indictment herein against the defendants, Chas. W. Reilley, et al., which said bill of indictment is clothed in the words and figures, following, to wit:

Bill of Indictment.

The United States of America, Western Division of the Southern District of Ohio, ss.:

No.———

In the District Court of the United States, within and for the Western Division of the Southern District of

Ohio, in the Sixth Judicial Circuit, of the term of October, in the year of our Lord one thousand, eight hundred and ninety-nine.

First Count.

The Grand Jurors of the United States of America, duly empaneled, sworn and charged to inquire within and for the Western Division of said District, upon their oaths and affirmations, present that Charles W. Reilley, John Francis, Anthony Hoff and John Edgar, alias Peter Edgar, on, to wit, the fourth day of October, in the year of our Lord, one thousand, eight hundred and ninety-nine, in the county of Hamilton, in the State of Ohio, in the Circuit and Western Division of the district aforesaid, and within the jurisdiction of this court, did then and there unlawfully, knowingly and feloniously conspire together and with one another to commit an offense against the United States, to wit: To cause to be carried from one State to another in the United States, to wit: From the city of Newport, in the State of Kentucky, to the city of Cincinnati, in the State of Ohio, papers, certificates and instruments purporting to be and to represent, as they then and there well knew, tickets, chances, shares and interests in and dependent upon the event of a lottery and similar enterprise offering prizes dependent upon lot and chance, that is to say, to cause to be carried as aforesaid papers, certificates and instruments purporting to be and to represent the chances, shares and interests in the prizes, which, by lot and chance, might be awarded to persons (to these grand jurors unknown) who might select certain numbers which by lot and chance should be included in twelve numbers drawn and selected as hereinafter stated, at certain drawings in lottery, which was an enterprise offering prizes dependent upon lot and chance and commonly known as "policy," and consisted, as they then and there well knew, in the drawing and selection by lot and chance, at stated intervals, of twelve of the numbers from one to seventy-eight, inclusive, and of awarding prizes in various amounts (to these grand jurors unknown) to those who prior to the time of any one of said drawings and selections, upon the payment of a small sum of money, may have selected various combinations of numbers included in the said twelve numbers thereafter drawn and selected by lot and chance as aforesaid; and the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that in pursuance of said conspiracy and to effect the object thereof, being for the purpose of causing to be carried

from one State into another in the United States, to wit: From the State of Kentucky to the State of Ohio, as aforesaid, papers, certificates and instruments purporting to be and to represent tickets, chances, shares and interests in and dependent upon the event of a lottery and similar enterprise offering prizes dependent upon lot and chance, as aforesaid, as they then and there well knew, said Anthony Hoff, John Edgar, alias Peter Edgar, Charles W. Reilley, and John Francis, did then and there, on said date aforesaid, in the County, State, Circuit, Division and District aforesaid, unlawfully, knowingly and feloniously cause to be carried from one State to another in the United States, to wit: from Newport, in the State of Kentucky, to Cincinnati, in the State of Ohio, five certain papers, certificates and instruments purporting to be and to represent chances, shares and interests in the prizes to be awarded by lot and chance in the drawings to be made thereafter in said certain lottery, commonly known as the game of "policy," which said papers, certificates and instruments were in the words and figures, following, to wit:

| | | |
|---|---|---|
| | 5-17-70.75. | 7-27-57-73 |
| "K." | 10.22.66.75 | 7-33-47-74 |
| | 7.17.27.75 | 1-11-39-49 |
| 23.35.47.49.58— | 3. 9.17.75 | 1-13-50-51 |
| | 7. 9.53.75. | 5-25-50-75 |
| (20) | Ky | K (5) (0) |
| 13-26-62-75 | | 6-10.16.69.75 |
| 6.20.26.75 | | 6-12-23 62 75 (5) |
| | (5) | |
| 75 Day | (20) | 6-13-26-62 |
| Ky 1st 12. | | 6-50.74 75 (5) |
| | | Ky 75-Day (15) |

Said papers, certificates and instruments, and the letters and figures thereon, purported and represented to be and were tickets, chances, shares and interests in and dependent upon the event of a lottery and similar enterprise offering prizes dependent upon lot and chance, and were and did represent various combinations of numbers selected by one H. T. Harrison, and other players and persons to the grand jurors unknown, as and being their interest and chance in a proposed drawing of said lottery, in accordance with the general scheme and plan hereinbefore described; contrary to the form of the stat-

ute in such case made and provided, and against the peace and dignity of the United States of America.

William E. Bundy,
United States Attorney, S. D. O.

Endorsed on cover. Indictment for conspiracy. Sec. 5440. Am. 1st Supp. 264. Act Mch. 2, 1895. 2 Supt. 435. A true bill. J. M. Robinson, Foreman Grand Jury.

---

And afterwards, to wit: on the 6th day of October, A. D. 1899, the following praecipe for capias was filed in the clerk's office of said court, clothed in the words and figures, following, to wit:

Praecipe for Capias.

United States District Court, Southern District of Ohio, Western Division:

U. S.
vs. } No. 377.
Charles W. Reilly, et al.

To Benjamin R. Cowen,
Clerk of said Court:

Please issue capias for above named Chas. W. Reilly, John Francis, John Edgar, alias Peter Edgar.

Wm. E. Bundy,
Attorney for U. S.

---

And afterwards, to wit: on the 6th day of October, A. D. 1899, there was issued out of the clerk's office of said court, our certain capias ad respondendum, directed to the Marshal of said District and against the defendants herein, said capias ad respondendum was clothed in the words and figures, following, to wit:

Capias Ad Respondendum.

United States of America, Southern District of Ohio, Western Division, ss.:

The President of the United States of America, to the Marshal of the Southern District of Ohio—Greeting: We command you to take Charles W. Reilly, John

Francis and John Edgar, alias Peter Edgar, if they may be found in your bailiwick, and them safely keep so that you have their bodies before the Judge of the District Court of the United States, within and for the Western Division of the Southern District of Ohio, at the city of Cincinnati in said district forthwith to answer unto the United States of America on an indictment for conspiracy, Sect. 5440, Act. Mch. 2d, 1895, 2 Supt., 1435 presented to said court against them the said Charles W. Reilley, John Francis, John Edgar, alias Peter Edgar, on the sixth day of October, A. D. 1899, by the grand jury of the United States within and for the Western Division of the Southern District of Ohio.

Hereof fail not, under the penalty of the law, and have then and there this writ.

Witness, the Honorable Albert C. Thompson, Judge of the District Court of the United States, this sixth day of October, A. D. 1899, and in the 124 year of the Independence of the United States of America.

(Seal.) Attest:—B. R. Cowen,
Clerk of the United States District Court, S. D. O.
By Robt. C. Georgi, Deputy.

---

And afterwards, to wit: on the 6th day of October, A. D. 1899, an entry was made upon the Journal of said court, clothed in the words and figures, following, to wit:

Entry-Journal 7, Page 417.

Defendants arrested. C. W. Reilley Arraignment, &c.

This day came the District Attorney on behalf of the United States and said defendant being present in court pursuant to the tenor of his recognizance heretofore taken herein, and having been arraigned at the bar of this court and said indictment read to him for plea says he is not guilty in manner and form as therein charged, and for his trial puts himself upon the country and the District Attorney doth the like and on motion of the District Attorney, it is ordered that said defendant enter into a recognizance with good and sufficient security in the sum of $1,000.00 for his appearance before this court on Monday morning next and from day to day thereafter as he may be required.

---

And afterwards, to wit: on the 6th day of October, A. D. 1899, the following recognizance was filed in the

clerk's office of the court aforesaid, clothed in the words and figures, following, to wit:

Recognizance of Charles W. Reilley.

The United States of America, Southern District of Ohio, ss.:

Be it remembered, that on this 6th day of October, A. D. 1899, before me B. R. Cowen, Clerk of the United States District Court, within and for the district aforesaid, duly appointed as such by the said court, personally came Charles W. Reilley, as principal, and Thomas C. McGrath, as sureties, and jointly and severally acknowledged themselves to owe the United States of America in the sum of one thousand dollars, to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to wit:

The condition of this recognizance is such, that if the said Charles W. Reilley shall personally appear before the District Court of the United States, in and for the district aforesaid, at Cincinnati, Ohio, on Monday at 10 o'clock A . M., October 9th, 1899, and then and from day to day during the October term, 1899, and then and there to answer unto an indictment pending therein for conspiracy, Sect. 5440, Act Mch. 2, 1895, 2 Supt. 435; and then and there abide the further order of said court, and not depart without leave thereof, then this recognizance to be void; otherwise to remain in full force and virtue.

C. W. Reilley, (Seal.)
Thos. C. McGrath. (Seal.)

Taken and acknowledged before me on the day and year first above written.

Robt. C. Georgi,
Dep. Clerk U. S. District Court, Southern District of Ohio.

United States of America, Southern District of Ohio, ss.:

I, Thomas C. McGrath, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities, I am worth ten thousand dollars in real estate in my own name, situate in the county of Hamilton, in said district.

Thos. C. McGrath.

Sworn to before me the sixth day of October, 1899.

Robt. C. Georgi,
Dep. Clerk U. S. District Court, S. D. O.

And afterwards, to wit: on the 7th day of October, A. D. 1899, came the Marshal of the District, to whom the aforesaid capias ad respondendum was in form directed, and returned the same into the clerk's office of said court, with his proceedings thereon endorsed, clothed in the words and figures, following, to wit:

Marshal's Return of Capias Ad Respondendum.

Received this writ at Cincinnati, Ohio, on the 6th day of October, 1899, and on the same day executed same by taking into custody the bodies of the within named Charles W. Reilley, John Francis and John Edgar, alias Peter Edgar, at Cincinnati, Ohio, and have their bodies now before court, as within it is commanded.

V. J. Fagin,
U. S. Marshal, S. D. O.
By Louis J. Huwe,
Deputy.

Fees, $7.18.

---

And afterwards, to wit: on the 7th day of October, A. D. 1899, an entry was made upon the Journal of said court, clothed in the words and figures, following, to wit:

Entry-Journal 7, Page 423.

John Francis, Anthony Hoff and Jno. Edgar Arraigned, &c.

This day came the District Attorney on behalf of the United States, and said defendants being present in court in the custody of the Marshal, and having been arraigned at the bar of this court and said indictment read to them for plea say they are not guilty in manner and form as therein charged, and for their trial put themselves upon the country, and the District Attorney doth the like, and on motion of the District Attorney it is ordered that said defendants and each of them, enter into a recognizance with good and sufficient security in the sum of $1,000.00 for his appearance before this court from day to day as he may be required.

---

And afterwards, to wit: on the 7th day of October, A. D. 1899, the following recognizance was filed in the clerk's office of the court aforesaid, clothed in the words and figures, following, to wit:

Recognizance of John Francis.

The United States of America, Southern District of Ohio, ss.:

Be it remembered, that on this 6th day of October, A. D. 1899, before me, B. R. Cowen, Clerk of the United States District Court, within and for the district aforesaid, duly appointed as such by the said court, personally came John Francis, as principal, and Thomas C. McGrath, as sureties, and jointly and severally acknowledged themselves to owe the United States of America in the sum of one thousand dollars, to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to wit:

The condition of this recognizance is such, that if the said John Francis shall personally appear before the District Court of the United States, in and for the district aforesaid, at Cincinnati, Ohio, on Monday, Oct. 9th, 1899, at 10 o'clock A. M., and then from day to day, during the October term, 1899, and then and there to answer unto an indictment pending therein for conspiracy, and then and there abide the further order of said court, and not depart without leave thereof, then this recognizance to be void; otherwise to remain in full force and virtue.

John Francis. (Seal.)
Thos. C. McGrath, (Seal.)

Taken and acknowledged before me on the day and year first above written.

Robt. C. Georgi,
Dep. Clerk U. S. District Court, Southern District of Ohio.

---

United States of America, Southern District of Ohio, ss.:

I, Thomas C. McGrath, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities, I am worth ten thousand dollars in real estate in my own name, situate in the county of Hamilton, in said district.

Thos. C. McGrath.
Sworn to before me the sixth day of October, 1899.
Robt. C. Georgi,
Dep. Clerk U. S. District Court, S. D. O.

---

And afterwards, to wit, on the 7th day of October, A. D. 1899, the following recognizance was filed in the

clerk's office of the court aforesaid clothed in the words and figures following, to wit:

Recognizance of Anthony Hoff.

The United States of America, Southern District of Ohio, ss.:

Be it remembered, that on this 7th day of October, A. D. 1899, before me, B. R. Cowen, clerk of the United States District Court, within and for the district aforesaid, duly appointed as such by the said court, personally came

Anthony Hoff,

as principal and Thomas C. McGrath, as surety, and jointly and severally acknowledged themselves to owe the United States of America in the sum of one thousand dollars, to be levied on their goods and chattels, land and tenements, if default be made in the condition following, to wit:

The condition of this recognizance is such, that if the said Anthony Hoff shall personally appear before the District Court of the United States, in and for the District aforesaid, at Cincinnati, Ohio, on Monday, October 9th, 1899, at 10 o'clock a. m., and from day to day during the October Term, 1899, and then and there to answer unto an indictment pending therein for conspiracy, Sect. 5440, Act Mch. 2, 1895, 2 Supt. 435, and then and there abide the further order of said court, and not depart without leave thereof, then this recognizance to be void; otherwise to remain in full force and virtue.

Anthony Hoff. (Seal.)
Thos. C. McGrath. (Seal.)

Taken and acknowledged before me on the day and year first above written.

Robt. C. Georgi, Dep. Clerk, U. S. District Court, Southern District of Ohio.

United States of America, Southern District of Ohio, ss.:

I, Thomas C. McGrath, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities, I am worth ten thousand dollars in real estate in my own name, situate in the County of Hamilton, in said District.

Thos. C. McGrath.

Sworn to before me the seventh day of October, 1899.
Robt. C. Georgi, Dep. Clerk, U. S. District Court, S. D. O.

---

And afterwards, to wit, on the 7th day of October, A. D. 1899, the following recognizance was filed in the clerk's office of the court aforesaid clothed in the words and figures following, to wit:

Recognizance of John Edgar, Alias Peter Edgar.

The United States of America, Southern District of Ohio, ss.:

Be it remembered, that on this 7th day of October, A. D. 1899, before me, B. R. Cowen, clerk of the United States District Court, within and for the district aforesaid, duly appointed as such by the said court, personally came

John Edgar, Alias Peter Edgar,

as principal and Thomas C. McGrath, as sureties, and jointly and severally acknowledged themselves to owe the United States of America in the sum of one thousand dollars, to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to wit:

The condition of this recognizance is such, that if the said John Edgar, alias Peter Edgar, shall personally appear before the District Court of the United States, in and for the District aforesaid, at Cincinnati, Ohio, on Monday at 10 o'clock a. m., October 9th, 1899, and then from day to day during the October Term, 1899, and then and there to answer unto an indictment pending therein for conspiracy, Sect. 5440, Act Mch. 2, 1895, 2 Supt. 435, and then and there abide the further order of said court, and not depart without leave thereof, then this recognizance to be void; otherwise to remain in full force and virtue.

John Edgar. (Seal.)
Thos. C. McGrath. (Seal.)

Taken and acknowledged before me on the day and year first above written.

Robt. C. Georgi, Dep. Clerk, U. S. District Court, Southern District of Ohio.

United States of America, Southern District of Ohio, ss.:

I, Thomas C. McGrath, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities, I am worth ten thousand dollars in real estate in my own name, situate in the County of Hamilton, in said District.

Thos. C. McGrath.

Sworn to before me the seventh day of October, 1899. Robt. C. Georgi, Dep. Clerk, U. S. District Court, S. D. O.

---

And afterwards, to wit, on the 9th day of October, A. D. 1899, an entry was made upon the Journal of said court clothed in the words and figures following, to wit:

Entry—Journal 7, Page 429.

Leave to File Motion.

This day came the District Attorney on behalf of the United States, and said defendants being present in court pursuant to the tenor of their recognizances heretofore taken herein, whereupon, by leave of court, a motion to quash said indictment as to all was filed by counsel herein.

---

And afterwards, to wit, on the 9th day of October, A. D. 1899, the following motion was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Motion to Quash.

The United States of America, Western Division of the Southern District of Ohio.

The United States, Plaintiff,
versus
Charles W. Reiley et al., Defendants.
} No. 377. Motion.

Now comes Charles W. Reily, one of the defendants herein, and moves the court to quash the indictment herein:

1st. Because the same charges no offense against any valid law of the United States.

2nd. Because the same is so vague, indefinite and uncertain as not to fairly advise the defendant of what he is charged, and does not sufficiently state facts sufficient to apprise him of the nature of the charge so as to enable him to prepare defense thereto.

3rd. Because the same is bad for duplicity in that it charges various distinct offenses in the same account of the indictment.

4th. Because the same was not presented upon any legal and valid testimony as required by law.

5th. Because the same was obtained by illegal and incompetent testimony presented to the Grand Jury.

6th. Because the indictment was obtained on such incompetent evidence without affording the accused an opportunity of preliminary hearing.

7th. Because of other good and sufficient reasons apparent of record herein.

Shay & Cogan,
Attorneys for Defendants.

---

And afterwards, to wit, on the 9th day of October, A. D. 1899, the following motion was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Motion to Quash.

The United States of America, Western Division of the Southern District of Ohio.

The United States, Plaintiff,
versus
Chas. W. Reily et al.
No. 377.
Motion.

Now comes John Francis, one of the defendants herein, and moves the court to quash the indictment herein:

1st. Because the same charges no offense against any valid law of the United States.

2nd. Because the same is so vague, indefinite and uncertain as not to fairly advise the defendant of what he is charged, and does not sufficiently state facts sufficient to apprise him of the nature of the charge so as to enable him to prepare defense thereto.

3rd. Because the same is bad for duplicity in that it charges various distinct offenses in the same account of the indictment.

4th. Because the same was not presented upon any legal and valid testimony as required by law.

5th. Because the same was obtained by illegal and incompetent testimony presented to the Grand Jury.

6th. Because the indictment was obtained on such incompetent evidence without affording the accused an opportunity of preliminary hearing.

7th. Because of other good and sufficient reasons apparent of record herein.

Shay & Cogan,
Attorneys for Defendants.

---

And afterwards, to wit, on the 9th day of October, A. D. 1899, the following motion was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Motion to Quash.

The United States of America, Western Division of the Southern District of Ohio.

The United States, Plaintiff,
versus
Charles W. Reiley et al., Defendants.

No. 377.
Motion.

Now comes Anthony Hoff, one of the defendants herein, and moves the court to quash the indictment herein:

1st. Because the same charges no offense against any valid law of the United States.

2nd. Because the same is so vague, indefinite and uncertain as not to fairly advise the defendant of what he is charged, and does not sufficiently state facts sufficient to apprise him of the nature of the charge so as to enable him to prepare defense thereto.

3rd. Because the same is bad for duplicity in that it charges various distinct offenses in the same account of the indictment.

4th. Because the same was not presented upon any legal and valid testimony as required by law.

5th. Because the same was obtained by illegal and incompetent testimony presented to the Grand Jury.

6th. Because the indictment was obtained on such incompetent evidence without affording the accused an opportunity of preliminary hearing.

7th. Because of other good and sufficient reasons apparent of record herein.

Shay & Cogan,
Attorneys for Defendants.

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And afterwards, to wit, on the 9th day of October, A. D. 1899, the following motion was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Motion to Quash.

The United States of America, Western Division of the Southern District of Ohio.

The United States, Plaintiff,
versus
Charles W. Reiley et al., Defendants.
Motion.
No. 377.

Now comes Charles W. Reiley, one of the defendants defendants herein, and moves the court to quash the indictment herein:

1st. Because the same charges no offense against any valid law of the United States.

2nd. Because the same is so vague, indefinite and uncertain as not to fairly advise the defendant of what he is charged, and does not sufficiently state facts sufficient to apprise him of the nature of the charge so as to enable him to prepare defense thereto.

3rd. Because the same is bad for duplicity in that it charges various distinct offenses in the same account of the indictment.

4th. Because the same was not presented upon any legal and valid testimony as required by law.

5th. Because the same was obtained by illegal and incompetent testimony presented to the Grand Jury.

6th. Because the indictment was obtained on such incompetent evidence without affording the accused an opportunity of preliminary hearing.

7th. Because of other good and sufficient reasons apparent of record herein.

Shay & Cogan,
Attorneys for Defendants.

And afterwards, to wit, on the 13th day of January, A. D. 1900, the following opinion was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Opinion of Judge Thompson.

United States District Court, Southern District of Ohio, Western Division.

The United States
vs.
Charles W. Reiley et al., Defendants. } No. 377.

The indictment charges that the defendants conspired to commit an offense against the United States, to wit, to cause to be carried from one state to another in the United States, papers, certificates and instruments purporting to be and represent tickets, chances, shares and interests in and dependent upon the event of a lottery and similar enterprise, offering prizes dependent upon lot or chance. (See Rev. Stat., Sec. 5440 and Act of March 2, 1895, U. S. Stat. at L. Vol. 28, page 963.)

To the indictment each of the defendants has interposed a motion to quash. Of the seven assignments of these motions, only the first and second are presented in argument. These read as follows:

"1. Because the same charges no offense against any valid law of the United States."

"2. Because the same is so vague, indefinite and uncertain as not to fairly advise the defendant of what he is charged, and does not sufficiently state facts sufficient to apprise him of the nature of the charge so as to enable him to prepare defense thereto."

The constitutional question was raised in France vs. The United States, 164 U. S. 676, but was not decided, and this court will not consider it here.

The question remaining is whether the indictment states facts sufficient, and with sufficient definiteness and certainty to apprise the defendants of the nature of the charge, so as to enable them to prepare defenses thereto.

The indictment clearly sets forth the conspiracy to commit one of the offenses defined and described in the Act of Congress of March 2, 1895, entitled "An Act for the suppression of lottery traffic through national and interstate commerce and the postal service subject to the jurisdiction and laws of the United States."

Now, does it sufficiently set forth the overt act, in pursuance of the conspiracy, relied on to sustain the indictment?

It is alleged that in pursuance of the conspiracy five papers were caused, by the defendants, to be carried from Newport, in the State of Kentucky, to Cincinnati, in the State of Ohio, in the United States, which, as the defendants well knew, purported to be and to represent chances, shares and interests in prizes to be awarded by lot and chance, in drawings to be made thereafter, in a certain lottery, commonly known as the game of policy. Copies of these papers are given in the indictment. It is true that these papers on their face, do not show to the uninitiated the purport or meaning alleged in the indictment, but this can be shown by the evidence. These papers are further described and identified as representing combinations of numbers, selected by one H. T. Harrison and other players, in accordance with the plan of the lottery described in the indictment, which consisted in the drawing and selection, by lot and chance, at stated intervals, of twelve of the numbers, from one to seventy-eight, inclusive, and the awarding of prizes, in various amounts, to those who, prior to the time of the drawing, after paying a small sum of money, should select combinations of numbers, which afterwards should be found included in the twelve numbers, thereafter drawn and selected by lot and chance, and that they represented the interest of Harrison and the other players in the drawing. A fuller statement would have been more satisfactory, but the facts stated are sufficient to identify the transaction and to enable the defendants to prepare their defense, and to sustain any judgment which may be rendered. The motions will therefore be overruled.

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And afterwards, to wit, on the 13th day of January, A. D. 1900, an entry was made upon the Journal of said court, clothed in the words and figures following, to wit:

Entry—Journal 7, Page .

Motions to Quash Overruled.

This day came the District Attorney on behalf of the United States, and said defendants being present in court pursuant to the tenor of their recognizances heretofore taken herein, and this cause came on to be heard upon a motion to quash, filed by each defendant, and the

same being argued by counsel, the court, after due consideration, overrules each and every one of said motions.

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And afterwards, to wit, on the 5th day of February, A. D. 1900, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Entry. Journal 7, page 481.

Recognizance forfeited and respite.

This day came the district attorney on behalf of the United States, and said defendant, though being three times solemnly called to come into court, pursuant to the tenor of his recognizance heretofore taken herein, came not but made default, and said Thomas C. McGrath, his surety, being in like manner three times solemnly called to come into court and with him bring the body of his said principal as by the tenor of his recognizance he was bound to do came not, but made default.

It is therefore considered that the recognizance of the said defendant and of his said surety be forfeited and on motion of the district attorney, it is ordered that the said forfeiture of the recognizance herein be respited to the next term of this court, and this cause is continued.

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And afterwards, to wit, but on the same day as aforesaid, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Entry. Journal 7, page 481.

Recognizance forfeited and respite.

This day came the district attorney on behalf of the United States, and said defendant, though being three times solemnly called to come into court, pursuant to the tenor of his recognizance heretofore taken herein, came not but made default, and said Thomas C. McGrath, his surety, being in like manner three times solemnly called to come into court and with him bring the body of his said principal as by the tenor of his recognizance he was bound to do came not, but made default.

It is therefore considered that the recognizance of the said defendant and of his said surety be and it is hereby forfeited and on motion of the district attorney, it is ordered that the said forfeiture of the recognizance herein be respited to the next term of this court, and this cause is continued.

And afterwards, to wit, but on the same day as aforesaid, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Entry. Journal 7, page 481.

Recognizance forfeited and respite.

This day came the district attorney on behalf of the United States, and said defendant, though being three times solemnly called to come into court, pursuant to the tenor of his recognizance heretofore taken herein, came not but made default, and Thomas C. McGrath, his surety, being in like manner three times solemnly called to come into court and with him bring the body of his said principal as by the tenor of his recognizance he was bound to do came not, but made default.

It is therefore considered that the recognizance of the said defendant and of his said surety be and it is hereby forfeited and on motion of the district attorney, it is ordered that said forfeiture be respited to the next term of this court, and this cause is continued.

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And afterwards, to wit, on the 5th day of February, A. D. 1900, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Entry. Journal 7, page 482.

Recognizance forfeited and respite.

This day came the district attorney on behalf of the United States, and said defendant, though being three times solemnly called to come into court, pursuant to the tenor of his recognizance heretofore taken herein, came not but made default, and said Thomas C. McGrath, his surety, being in like manner three times solemnly called to come into court and with him bring the body of his said principal as by the tenor of his recognizance he was bound to do came not, but made default.

It is therefore considered that said recognizance be and it is hereby forfeited and on motion of the district attorney, it is ordered that said forfeiture be and it is hereby respited to the next term of this court, and this cause is continued.

And afterwards, to wit, on the 12th day of March, A. D. 1900, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Entry. Journal 7, page 492.

Trial begun.

This day came the district attorney on behalf of the United States, and said defendants being present in court pursuant to the tenor of their recognizances heretofore taken herein, whereupon to try the issues joined a jury being called came, to wit: F. K. Bowles, W. C. Bryant, Cyrus Brown, Charles H. Eulass, James C. Corcoran, John M. Dudley, Geo. H. Rader, Wm. Swisher, Wm. Sprow, Wilson B. Smith, W. P. Ammon and Adolph Nickel, who were duly empaneled and sworn well and truly to try the issues joined, but the testimony not being finished the court respited the jury until to-morrow morning at ten o'clock, to which time this cause is continued.

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And afterwards, to wit, on the 13th day of March, A. D. 1900, an entry was made upon the journal of said court, clothed in the words and figures, following, to wit:

Entry. Journal 7, page 492.

Trial continued.

This day came the district attorney again on behalf of the United States, also the defendants and the jury heretofore empaneled and sworn herein, but the testimony not being finished, the court respited the jury until to-morrow morning at ten o'clock, to which time this cause is continued.

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And afterwards, to wit, on the 13th day of March, A. D. 1900, an entry was made upon the journal of said court, clothed in the words and figures, following, to wit:

Entry. Journal 7, page 492.

Rule to show cause to issue.

The President of the United States of America, to John M. Price, No. 614 York St., Newport, Ky.:

You are hereby cited and admonished to be and appear before our district court of the United States, within and for the Southern District of Ohio, forthwith, to show

cause, if any you know or have, why you failed to obey the subpoena served upon you at your residence by not attending court as you were commanded, to testify as a witness in the above entitled cause.

And it is ordered that the marshal of this district make legal service and due return of this rule on or before the appearance day above noted.

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And afterwards, to wit, on the 13th day of March, A. D. 1900, there was issued out of the clerk's office of said court, our certain rule to show cause, clothed in the words and figures, following, to wit:

Rule to Show Cause.

In the District Court of the United States, Western Division of the Southern District of Ohio.

| | |
|---|---|
| The United States, | |
| vs. | Rule to Show Cause. No. 377. |
| Chas. Reiley, et al. | |

The President of the United States of America, to John M. Price, No. 614 York St., Newport, Ky.:

You are hereby cited and admonished to be and appear before our district court of the United States, within and for the Southern District of Ohio, forthwith, to show cause, if any you know or have, why you failed to obey the subpoena served upon you at your residence, by not attending court as you were commanded, to testify as a witness in the above entitled cause.

And it is ordered that the marshal of this district make legal service and due return of this rule on or before the appearance day above noted.

Witness the Honorable Albert C. Thompson, judge of said court and the seal thereof, this 13th day of March, A. D. 1900.

(Seal.) Attest: B. R. Cowen, Clerk.

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And afterwards, to wit, on the 14th day of March, A. D. 1900, came the marshal of the District of Kentucky, and returned the aforesaid rule to show cause into the clerk's office of said court, with his proceedings thereon

endorsed, clothed in the words and figures, following, to wit:

Marshal's Return of Rule to Show Cause.

Received this writ on the 13" of March, 1900, executed by arresting the within named John M. Price and now have his body in court as commanded, this 14" day of March, 1900.

A. D. James, U. S. Marshal.
By J. D. Compton, Deputy.

Fees . . . . . 2 00
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2 40

And afterwards, to wit, on the 14th day of March, A. D. 1900, the following motion to acquit was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Motion of Charles W. Reilley to Acquit.

District Court, S. D. O., W. D.

The United States, Plaintiff,
vs. No. 377. Motion.
Charles W. Reilley, Defendant.

And now comes the defendant, Charles W. Reilley, and moves the court to direct the jury to acquit him:

1st. Because the said indictment does not charge an offense within the jurisdiction of this court.

2nd. Because the facts and statements contained in the indictment charge no crime against any valid law of the United States.

3rd. Because the said act of March 2, 1895, 3 Session, 53 Congress, p. 963, is an act not within the constitutional power of the Congress of the United States in so far as therein contained, to wit: "That any person who shall cause to be carried from one state to another in the United States any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift, concert, or similar enterprise offering prizes dependent upon lot or chance," and is therefore illegal and void.

4th. Because there is no sufficient proof to support a conviction under any count in this indictment as against this defendant.

Shay & Cogan,
Attys. for Deft.

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And afterwards, to wit, on the 14th day of March, A. D. 1900, the following motion to acquit was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Motion of John Francis to Acquit.

District Court, S. D. O., W. D.

| | | |
|---|---|---|
| The United States, | Plaintiff, | No. 377. Motion. |
| vs. | | |
| John Francis, | Defendant. | |

And now comes the defendant, John Francis, and moves the court to direct the jury to acquit him:

1st. Because the said indictment does not charge an offense within the jurisdiction of this court.

2nd. Because the facts and statements contained in the indictment charge no crime against any valid law of the United States.

3rd. Because the said act of March 2, 1895, 3 Session, 53 Congress, p. 963, is an act not within the constitutional power of the Congress of the United States in so far as therein contained, to wit: "That any person who shall cause to be carried from one state to another in the United States any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share or interest in or dependent upon the event of a lottery, so-called gift, concert, or similar enterprise offering prizes dependent upon lot or chance," and is therefore illegal and void.

4th. Because there is no sufficient proof to support a conviction under any count in this indictment as against this defendant.

Shay & Cogan,
Attys. for Deft.

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And afterwards, to wit, on the 14th day of March, A. D. 1900, the following motion to acquit was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Motion of Anthony Hoff to Acquit.

District Court, S. D. O., W. D.

The United States, Plaintiff,
vs.
Anthony Hoff, Defendant.
No. 377.
Motion.

And now comes the defendant, Anthony Hoff, and moves the court to direct the jury to acquit him:

1st. Because the said indictment does not charge an offense within the jurisdiction of this court.

2nd. Because the facts and statements contained in the indictment charge no crime against any valid law of the United States.

3rd. Because the said act of March 2, 1895, 3 Session, 53 Congress, p. 963, is an act not within the constitutional power of the Congress of the United States in so far as therein contained, to wit: "That any person who shall cause to be carried from one state to another in the United States any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share or interest in or dependent upon the event of a lottery, so-called gift, concert, or similar enterprise offering prizes dependent upon lot or chance," and is therefore illegal and void.

4th. Because there is no sufficient proof to support a conviction under any count in this indictment as against this defendant.

Shay & Cogan,
Attys. for Deft.

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And afterwards, to wit, on the 14th day of March, A. D. 1900, the following motion to acquit was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Motion of John Edgar, Alias Peter Edgar, to Acquit.

District Court, S. D. O., W. D.

The United States, Plaintiff,
vs.
John Edgar, alias Peter Edgar, Defendant.
Motion.
No. 377.

And now comes the defendant, John Edgar, Alias Peter Edgar and moves the court to direct the jury to acquit him:

1st. Because the said indictment does not charge an offense within the jurisdiction of this court.

2nd. Because the facts and statements contained in the indictment charge no crime against any valid law of the United States.

3rd. Because the said act of March 2, 1895, 3 Session, 53 Congress, p. 963, is an act not within the constitutional power of the Congress of the United States in so far as therein contained, to wit: "That any person who shall cause to be carried from one state to another in the United States any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share or interest in or dependent upon the event of a lottery, so-called gift, concert, or similar enterprise offering prizes dependent upon lot or chance," and is therefore illegal and void.

4th. Because there is no sufficient proof to support a conviction under any count in this indictment as against this defendant.

Shay & Cogan,
Attys. for Deft.

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And afterwards, to wit, on the 14th day of March, A. D. 1900, an entry was made upon the the journal of said court, clothed in the words and figures, following, to wit:

Entry. Journal 7, page 493.

Motions overruled.

This cause came on further to be heard on a motion filed by each defendant to acquit, and the same being argued by counsel, the court after due consideration overrules the same.

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And afterwards, to wit, on the 14th day of March, A. D. 1900, an entry was made upon the the journal of said court, clothed in the words and figures, following, to wit:

Entry. Journal 7, page 493.

Trial continued.

This day again came the district attorney on behalf of the United States, also the defendants and the jury heretofore empaneled and sworn herein, and the testimony and arguments of counsel being finished, but the charge of the court not being given, the court respited the jury until to-morrow morning at eleven o'clock, to which time this cause is continued.

And afterwards, to wit, on the 15th day of March, A. D. 1900, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Entry. Journal 7, page 494.

Trial concluded. Verdict. Recognizance fixed for each.

This day came the district attorney on behalf of the United States, also the jury heretofore empaneled and sworn herein, and said defendants being present in court, and the charge of the court being given the jury after deliberation returned the following verdict, to wit: "We, the jury herein do find the said defendants guilty in manner and form as charged in the said indictment. Signed, William C. Bryant, Foreman."

And thereupon the said defendants each filed a motion to arrest judgment, also a motion for a new trial. It was thereupon ordered by the court that each of said defendants enter into a recognizance for their appearance, until the hearing and disposal of said motions, with good and sufficient sureties to be approved by the court, in the following amounts, John Francis in the sum of $5,000.00, and Charles W. Reilley, Anthony Hoff and John Edgar, alias Peter Edgar, each in the sum of $2,000.00, which said recognizances were accordingly filed.

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And afterwards, to wit, on the 15th day of March, A. D. 1900, the following motion to arrest judgment, was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Motion to Arrest Judgment.

District Court of the United States, S. D. O., Western Division.

| | | |
|---|---|---|
| The United States, | Plaintiff, | No.— Motion to Arrest Judgment. |
| vs. | | |
| Charles W. Reilley, et al., | Defendants. | |

And now comes the defendant, Charles W. Reilley, and moves the court in arrest of judgment herein:

First. Because the court erred in overruling the motion to quash hereinbefore filed.

Second. Because the court erred in overruling the demurrer hereinbefore filed.

Third. Because the said indictment does not charge an offense within the jurisdiction of this court.

Fourth. Because the proof adduced does not show an offense committed within the jurisdiction of this court.

Fifth. Because the facts and statements contained in the indictment charged no crime against any valid law of the United States.

Sixth. Because the said act of March 2, 1895, 3 Section, 53 Congress, p. 963, in so far as the same is contained and set forth in this indictment and more particularly mentioned in the words of said statute, as follows, to wit:

"That any person who shall cause to be carried from one state to another in the United States any paper, certificate or instrument purporting to be or to represent a ticket, chance, share or interest in or dependent upon the event of a lottery, so-called gift, concert or similar enterprise offering prizes dependent upon lot or chance, which same is not an act within the constitutional power of the Congress of the United States, and is therefore illegal and void."

Shay & Cogan,
Attorneys for Defendants.

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And afterwards, to wit, on the 15th day of March, A. D. 1900, the following Motion to Arrest Judgment, was filed in the Clerk's Office of said court, clothed in the words and figures, following, to wit:

Motion to Arrest Judgment.

District Court of the United States, S. D. O., Western Division.

The United States, Plaintiff,
vs.
Charles W. Reilley, et al., Defendants.
No.

Motion to Arrest Judgment.

And now comes the defendant John Francis, and moves the court in arrest of judgment herein:

First. Because the Court erred in overruling the motion to quash hereinbefore filed.

Second. Because the Court erred in overruling the demurrer hereinbefore filed.

Third. Because the said indictment does not charge an offense within the jurisdiction of this court.

Fourth. Because the proof adduced does not show an offense committed within the jurisdiction of this court.

Fifth. Because the facts and statements contained in the indictment charged no crime against any valid law of the United States.

Sixth. Because the said Act of March 2, 1895, 3 section, 53 Congress, P. 963, in so far as the same is contained and set forth in this indictment and more particularly mentioned in the words of said statute, as follows, to wit:

"That any person who shall cause to be carried from one State to another in the United States any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share or interest in or dependent upon the event of a lottery, so-called gift concert or similar enterprise offering prizes dependent upon lot or chance which same is not an act within the constitutional power of the Congress of the United States, and is therefore illegal and void."

Shay & Cogan,
Attorneys for Defendants.

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And afterwards, to wit, on the 15th day of March, A. D. 1900, the following Motion to Arrest Judgment, was filed in the Clerk's Office of said court, clothed in the words and figures, following, to wit:

Motion to Arrest Judgment.

District Court of the United States, S. D. O., Western Division.

The United States, Plaintiff,
vs.
Charles W. Reilley, et al., Defendants.
No.

Motion to Arrest Judgment.

And now comes the defendant Anthony Hoff, and moves the court in arrest of judgment herein:

First. Because the Court erred in overruling the motion to quash hereinbefore filed.

Second. Because the Court erred in overruling the demurrer hereinbefore filed.

Third. Because the said indictment does not charge an offense within the jurisdiction of this court.

Fourth. Because the proof adduced does not show an offense committed within the jurisdiction of this court.

Fifth. Because the facts and statements contained in the indictment charged no crime against any valid law of the United States.

Sixth. Because the said Act of March 2, 1895, 3 section, 53 Congress, P. 963, in so far as the same is contained and set forth in this indictment and more particularly mentioned in the words of said statute, as follows, to wit:

"That any person who shall cause to be carried from one State to another in the United States any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share or interest in or dependent upon the event of a lottery, so-called gift concert or similar enterprise offering prizes dependent upon lot or chance which same is not an act within the constitutional power of the Congress of the United States, and is therefore illegal and void."

Shay & Cogan,
Attorneys for Defendants.

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And afterwards, to wit, on the 15th day of March, A. D. 1900, the following Motion to Arrest Judgment, was filed in the Clerk's Office of said court, clothed in the words and figures, following, to wit:

Motion to Arrest Judgment.

District Court of the United States, S. D. O., Western Division.

The United States, Plaintiff,
vs.
Charles W. Reilley, et al., Defendants. } No.

Motion to Arrest Judgment.

And now comes the defendant John Edgar, and moves the court in arrest of judgment herein:

First. Because the Court erred in overruling the motion to quash hereinbefore filed.

Second. Because the Court erred in overruling the demurrer hereinbefore filed.

Third. Because the said indictment does not charge an offense within the jurisdiction of this court.

Fourth. Because the proof adduced does not show an offense committed within the jurisdiction of this court.

Fifth. Because the facts and statements contained in the indictment charged no crime against any valid law of the United States.

Sixth. Because the said Act of March 2, 1895, 3 section, 53 Congress, P. 963, in so far as the same is contained and set forth in this indictment and more particularly mentioned in the words of said statute, as follows, to wit:

"That any person who shall cause to be carried from one State to another in the United States any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share or interest in or dependent upon the event of a lottery, so-called gift concert or similar enterprise offering prizes dependent upon lot or chance which same is not an act within the constitutional power of the Congress of the United States, and is therefore illegal and void."

Shay & Cogan,
Attorneys for Defendants.

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And afterwards, to wit, on the 15th day of March, A. D. 1900, the following Motion for a New Trial was filed in the Clerk's Office of said Court, clothed in the words and figures following, to wit:

Motion for a New Trial.

District Court of the United States, S. D. O., Western Division.

The United States, Plaintiff,
vs. } No.
Charles W. Reilley, et al., Defendants.

Motion for a New Trial.

And now comes the defendant, Charles W. Reilley, and moves the court to grant a new trial for the following reasons, to wit:

First. Because the Court erred in overruling the motion to quash hereinbefore filed.

Second. Because the Court erred in overruling the demurrer hereinbefore filed.

Third. Because the verdict is contrary to law.

Fourth. Because the verdict rendered is contrary to the evidence.

Fifth. Because the verdict rendered is not supported by any legal or sufficient evidence.

Sixth. Because of errors of law occuring upon the trial and excepted to at the time.

Seventh. Because the Court erred in the admission of certain testimony.

Eighth. Because the court erred in the exclusion of certain testimony.

Ninth. Because the Court erred in refusing to give certain special instructions as requested.

10th. Because the Court erred in giving certain special instructions with modifications.

11th. Because the Court erred in the general charge as given, as excepted to at the time and more particularly stated at the time of the giving thereof.

Because the court erred in limiting argument of counsel.

12th. Because of other good and sufficient reasons apparent of record herein.

Shay & Cogan,
Attorneys for Defendants.

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And afterwards, to wit, on the 15th day of March, A. D. 1900, the following Motion for a New Trial was filed in the Clerk's Office of said Court, clothed in the words and figures following, to wit:

Motion for a New Trial.

District Court of the United States, S. D. O., Western Division.

The United States, Plaintiff,
vs.
Charles W. Reilley, et al., Defendants.
No.

Motion for a New Trial.

And now comes the defendant, John Francis, and moves the court to grant a new trial for the following reasons, to wit:

First. Because the Court erred in overruling the motion to quash hereinbefore filed.

Second. Because the Court erred in overruling the demurrer hereinbefore filed.

Third. Because the verdict is contrary to law.

Fourth. Because the verdict rendered is contrary to the evidence.

Fifth. Because the verdict rendered is not supported by any legal or sufficient evidence.

Sixth. Because of errors of law occuring upon the trial and excepted to at the time.

Seventh. Because the Court erred in the admission of certain testimony.

Eighth. Because the court erred in the exclusion of certain testimony.

Ninth. Because the Court erred in refusing to give certain special instructions as requested.

10th. Because the Court erred in giving certain special instructions with modifications.

11th. Because the Court erred in the general charge as given, as excepted to at the time and more particularly state at the time of the giving thereof.

Because the court erred in limiting argument of counsel.

12th. Because of other good and sufficient reasons apparent of record herein.

Shay & Cogan,
Attorneys for Defendants.

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And afterwards, to wit, on the 15th day of March, A. D. 1900, the following Motion for a New Trial was filed in the Clerk's Office of said Court, clothed in the words and figures following, to wit:

Motion for a New Trial.

District Court of the United States, S. D. O., Western Division.

The United States, Plaintiff,

vs. } No.

Charles W. Reilley, et al., Defendants.

Motion for a New Trial.

And now comes the defendant, Anthony Hoff, and moves the court to grant a new trial for the following reasons, to wit:

First. Because the Court erred in overruling the motion to quash hereinbefore filed.

Second. Because the Court erred in overruling the demurrer hereinbefore filed.

Third. Because the verdict is contrary to law.

Fourth. Because the verdict rendered is contrary to the evidence.

Fifth. Because the verdict rendered is not supported by any legal or sufficient evidence.

Sixth. Because of errors of law occuring upon the trial and excepted to at the time.

Seventh. Because the Court erred in the admission of certain testimony.

Eighth. Because the court erred in the exclusion of certain testimony.

Ninth. Because the Court erred in refusing to give certain special instructions as requested.

10th. Because the Court erred in giving certain special instructions with modifications.

11th. Because the Court erred in the general charge as given, as excepted to at the time and more particularly stated at the time of the giving thereof.

Because the court erred in limiting argument of counsel.

12th. Because of other good and sufficient reasons apparent of record herein.

Shay & Cogan,
Attorneys for Defendants.

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And afterwards, to wit, on the 15th day of March, A. D. 1900, the following Motion for a New Trial was filed in the Clerk's Office of said Court, clothed in the words and figures following, to wit:

Motion for a New Trial.

District Court of the United States, S. D. O., Western Division.

The United States, Plaintiff,
vs.
Charles W. Reilley, et al., Defendants.
No.

Motion for a New Trial.

And now comes the defendant, John Edgar,

and moves the court to grant a new trial for the following reasons, to wit:

First. Because the Court erred in overruling the motion to quash hereinbefore filed.

Second. Because the Court erred in overruling the demurrer hereinbefore filed.

Third. Because the verdict is contrary to law.

Fourth. Because the verdict rendered is contrary to the evidence.

Fifth. Because the verdict rendered is not supported by any legal or sufficient evidence.

Sixth. Because of errors of law occuring upon the trial and excepted to at the time.

Seventh. Because the Court erred in the admission of certain testimony.

Eighth. Because the court erred in the exclusion of certain testimony.

Ninth. Because the Court erred in refusing to give certain special instructions as requested.

10th. Because the Court erred in giving certain special instructions with modifications.

11th. Because the Court erred in the general charge as given, as excepted to at the time and more particularly stated at the time of the giving thereof.

Because the court erred in limiting argument of counsel.

12th. Because of other good and sufficient reasons apparent of record herein.

Shay & Cogan,
Attorneys for Defendants.

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And afterwards, to wit, on the 15th day of March, A. D. 1900, the following recognizance was filed in the Clerk's Office of the Court aforesaid, clothed in the words and figures, following, to wit:

Recognizance of Charles W. Reilley.

The United States of America, Southern District of Ohio, ss.:

Be it remembered that on this 15th day of March, A. D. 1900, before me B. R. Cowen, Clerk of the United States District Court, within and for the district aforesaid, duly appointed as such by the said court, personally came Charles W. Reilley, as principal and Thomas C.

McGrath, as sureties, and jointly and severally acknowledged themselves to owe the United States of America in the sum of two thousand dollars, to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to wit:

The condition of this recognizance is such, that if the said Charles W. Reilley shall personally appear before the District Court of the United States, in and for the District aforesaid, at Cincinnati, Ohio, from day to day, and then and there to answer unto an indictment pending therein for conspiracy, Sect. 5440, Act Mch. 2, 1895, 2 Supt. 435., and then and there abide the further order of said court, and not depart without leave thereof, then this recognizance to be void; otherwise to remain in full force and virtue.

C. W. Reilley, (Seal.)
Thos. C. McGrath, (Seal.)

Taken and acknowledged before me on the day and year first above written.

Robt. C. Georgi, Dep. Clerk,
(Seal.) U. S. District Court, Southern District of Ohio.

United States of America, Southern District of Ohio, ss.:

I, Thomas C. McGrath, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities, I am worth ten thousand dollars in real estate in my own name, situate in the county of Hamilton, in said District.

Thos. C. McGrath.

Sworn to before me the 15th day of March, 1900.

Robt. C. Georgi, Dep. Clerk,
(Seal.) U. S. District Court, S. D. O.

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And afterwards, to wit, on the 15th day of March, A. D. 1900, the following *recognizance* was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Recognizance of John Francis.

The United States of America, Southern District of Ohio, ss.:

Be it remembered, that on this 15th day of March, A. D. 1900, before me, B. R. Cowen, clerk of the United

States District Court, within and for the district aforesaid, duly appointed as such by the said court, personally came John Francis as principal and Thomas C. McGrath as sureties, and jointly and severally acknowledged themselves to owe the United States of America in the sum of five thousand dollars, to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to wit:

The condition of this recognizance is such, that if the said John Francis shall personally appear before the District Court of the U. S. in and for the Dist. aforesaid, at Cincinnati, O., from day to day, and then and there to answer unto an indictment pending therein for conspiracy, Sect. 5440, Act Mch. 2, 1895, 2 Supt. 435, and then and there abide the further order of said court, and not depart without leave thereof, then this recognizance to be void; otherwise to remain in full force and virtue.

John Francis. (Seal.)
Thos. C. McGrath. (Seal.)

Taken and acknowledged before me on the day and year first above written.

(Seal.) Robt. C. Georgi, Dep. Clerk, U. S. District Court, Southern District of Ohio.

United States of America, Southern District of Ohio, ss.:

I, Thomas C. McGrath, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities I am worth ten thousand dollars in real estate in my own name, situate in the County of Hamilton, in said District.

Thos. C. McGrath.

Sworn to before me the 15th day of March, 1900.

(Seal.) Robt. C. Georgi, Dep. Clerk, U. S. District Court, S. D. O.

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And afterwards, to wit, on the 15th day of March, A. D. 1900, the following recognizance was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Recognizance of Anthony Hoff.

The United States of America, Southern District of Ohio, ss.:

Be it remembered, that on this 15th day of March, A. D. 1900, before me, B. R. Cowen, clerk of the United

States District Court, within and for the district aforesaid, duly appointed as such by the said court, personally came Anthony Hoff as principal and John Donohue as sureties, and jointly and severally acknowledged themselves to owe the United States of America in the sum of two thousand dollars, to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to wit:

The condition of this recognizance is such, that if the said Anthony Hoff shall personally appear before the District Court of the U. S. in and for the Dist. aforesaid, at Cincinnati, O., from day to day, and then and there to answer unto an indictment pending therein for conspiracy, Sect. 5440, Act Mch. 2, 1895, 2 Supt. 435, and then and there abide the further order of said court, and not depart without leave thereof, then this recognizance to be void; otherwise to remain in full force and virtue.

Anthony Hoff. (Seal.)
John Donohue. (Seal.)

Taken and acknowledged before me on the day and year first above written.

(Seal.) Robt. C. Georgi, Dep. Clerk, U. S. District Court, Southern District of Ohio.

United States of America, Southern District of Ohio, ss.:

I, John Donohue, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities I am worth eighty-five hundred dollars in real estate in my own name, situate in the County of Hamilton, in said District.

John Donohue.

Sworn to before me the 15th day of March, 1900.

(Seal.) Robt. C. Georgi, Dep. Clerk, U. S. District Court, S. D. O.

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And afterwards, to wit, on the 15th day of March, A. D. 1900, the following recognizance was filed in the clerk's office of the court aforesaid, clothed in the words and figures following, to wit:

Recognizance of John Edgar, alias Peter Edgar.

The United States of America, Southern District of Ohio, ss.:

Be it remembered, that on this 15th day of March, A. D. 1900, before me, B. R. Cowen, clerk of the United

States District Court, within and for the district aforesaid, duly appointed as such by the said court, personally came John Edgar, alias Peter Edgar, as principal and John Donohue as sureties, and jointly and severally acknowledged themselves to owe the United States of America in the sum of two thousand dollars, to be levied on their goods and chattels, land and tenements, if default be made in the condition following, to wit:

The condition of this recognizance is such, that if the said John Edgar, alias Peter Edgar, shall personally appear before the District Court of the United States, in and for the District aforesaid, at Cincinnati, Ohio, from day to day, and then and there to answer unto an indictment pending therein for conspiracy, Sect. 5440, Act Mch. 2, 1895, 2 Supt. 435, and then and there abide the further order of said court, and not depart without leave thereof, then this recognizance to be void; otherwise to remain in full force and virtue.

John Edgar. (Seal.)
John Donohue. (Seal.)

Taken and acknowledged before me on the day and year first above written.

(Seal.) Robt. C. Georgi, Dep. Clerk, U. S. District Court, Southern District of Ohio.

United States of America, Southern District of Ohio, ss.:

I, John Donohue, one of the sureties above named, do solemnly swear that after paying my just debts and liabilities I am worth eighty-five hundred dollars in real estate in my own name, situate in the County of Hamilton, in said District.

John Donohue.

Sworn to before me the 15th day of March, 1900.

(Seal.) Robt. C. Georgi, Dep. Clerk, U. S. District Court, S. D. O.

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And afterwards, to wit, on the 2d day of April, A. D. 1900, an entry was made upon the Journal of said court, clothed in the words and figures following, to wit:

Entry—Journal 7, Page 500.

Motion for New Trial Overruled.

Bill of Exceptions Continued Until April Term.

This cause came on to be heard on the motion for a new trial heretofore filed herein, and was argued by

counsel, on consideration whereof the court doth overrule said motion, to which counsel for defendants except, and it is ordered that the time for presenting, settling, allowing, signing and sealing of a bill of exceptions be and it is hereby extended to and during the April term of this court.

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And afterwards, to wit, on the 9th day of April, A. D. 1900, an entry was made upon the Journal of said court, clothed in the words and figures following, to wit:

Entry—Journal 7, Page 516.

Motion to Arrest Judgment Overruled, & Sentence, &c.

This day again came the District Attorney on behalf of the United States, and said defendants, Charles W. Reilley, Peter Edgar, Anthony Hoff and John Francis, being present in court pursuant to the tenor of their several recognizances heretofore taken herein, and said action pending on the motions in arrest of judgment heretofore filed herein, on March 15th, 1900, and said motions having been argued by counsel, and duly considered by the court, are by the court overruled; and the District Attorney moving for sentence, the court pronounced the following sentence, to wit:

That the said defendant, Charles W. Reilley, be imprisoned in the Ohio Penitentiary for the period of two (2) years, and pay the costs of this prosecution.

That the said defendant, John Francis, be imprisoned in the Ohio Penitentiary for the period of eighteen (18) months, and pay a fine of one thousand ($1,000.00) dollars and the costs of this prosecution.

That the defendant, Peter Edgar, be imprisoned in the Ohio Penitentiary for the period of fifteen (15) months, and pay his costs herein to be taxed.

That the said defendant, Anthony Hoff, be imprisoned in the Ohio Penitentiary for the period of fifteen (15) months, and pay his costs herein to be taxed.

To all of which said defendants, by their counsel, except.

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And afterwards, to wit, on the 9th day of April, A. D. 1900, an entry was made upon the Journal of said court, clothed in the words and figures following, to wit:

Entry—Journal 7, Page 516.

Bill of Exceptions Signed and Allowed.

Now come the defendants, Charles W. Reilley, John Francis, Anthony Hoff and Peter Edgar, and present to the court their certain bill of exceptions herein, which the court finds to have been reasonably taken and reserved, and being found by the court to be true, is allowed, signed, sealed and on motion is hereby made part of the record in this cause.

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And afterwards, to wit, on the 9th day of April, A. D. 1900, the following bill of exceptions was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Bill of Exceptions.

In the District Court of the United States, Southern District of Ohio, Western Division.

| | |
|---|---|
| The United States of America, Plaintiff, | |
| vs. | No. ..... |
| Charles W. Reilley, John Francis, Anthony Hoff and Peter Edgar, Defendants. | |

Bill of Exceptions.

Be it remembered that on the day of April, A. D. 1900, at a stated term of said court, begun and holden in Cincinnati in and for the Southern District of Ohio and Western Division thereof, before the Hon. Albert C. Thompson, District Judge thereof, the issues joined in the above stated cause between the said parties came on to be tried before said judge and a jury, the plaintiff being represented by the United States District Attorney, Hon. William E. Bundy, and Assistant Sherman T. McPherson, and the defendants being represented by Messrs. Shay & Cogan, and the jury being called and duly sworn was impaneled as required by law, to try the issues joined.

The plaintiff, by its counsel, having stated its case to the judge and the jury, and the defendants, by their counsel, having stated their case to the judge and the jury, proceeded as follows, to wit:

The plaintiff, to maintain the issues upon its part, called as a witness , who, being duly sworn, testified as follows, to wit:

A. L. Francis, being called by the government and sworn, testifies as follows:

By Mr. McPherson:

Q. Where do you live, Mr. France?

A. I live at the present time in Dinsmore Park, a suburb of the city of Covington, Kentucky.

Q. How long have you lived in Covington?

A. It has been 18 or 19 years.

Q. What business, if any, are you in at present?

A. I am working on art work at present—an artist—painting.

Q. Are you acquainted with Edgar, one of the defendants in this case?

A. Yes, sir.

Q. Are you acquainted with Charles Reilley?

A. Yes, sir.

Q. Are you acquainted with John Francis?

A. No, sir.

Q. Do you know the gentleman here that goes by the name of Francis?

A. I have seen him on one occasion only.

Q. What is his name, if you know?

A. I understood it was Prior.

Q. Do you know Hoff?

A. No, sir.

Q. How long have you been acquainted with Charles Reilley?

A. About the same time—about 15 years.

Q. Were you ever connected with what is known as the game of policy, Mr. France?

A. Yes, sir.

Q. When—prior to when, I mean?

A. About 4 years ago/and prior to that time.

Q. How long had you been in the business of the game of policy previous to that time, Mr. France?

A. At different times, sir; I suppose for 25 years.

Q. I wish you would state to the jury now, carefully and explain to them what the game of policy is?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court counsel for the defendants at the time excepted.

By Mr. Shay:

May I have an exception to each of these questions, without objection, your honor?

The Court:

Well, whenever an objection is overruled, if you desire to except, call the court's attention to it.

Q. You may now proceed, Mr. France.

A. Do you want the method of conducting the business?

Q. Yes.

A. The policy business is the outgrowth of what was formerly known as the lottery business. The lottery business consisted of combinations of numbers printed upon tickets, the persons making the purchase at that time and only selecting such numbers as were on these tickets. Afterwards this game of policy was conceived, whereby the parties could select their own numbers and play as many of them as they wanted, and in the end it succeeded the lottery business, and for quite a number of years there has not been any lottery tickets issued at all. People simply go into the office, select their own numbers and they are placed upon slips of paper, returned to the head office; their "books" are there, called in lottery parlance, and these numbers are entered on these books and returned to the company. The lottery or policy that is decided by the drawing consists in placing 78 numbers in a wheel, that wheel is revolved until the numbers are properly mixed and in the morning there are 12 of these numbers drawn out and in the evening 13; these numbers are then printed, and the official prints, so called, are sent to the vendors where the players can go and see if they have won or lost.

Counsel for the defendants asks that each and every part of the above answer of the witness be stricken out, the court refuses so to do, to which ruling of the court, counsel for the defendants at the time excepted.

Q. More in detail, Mr. France, *for the jury's understanding*, suppose you were running a policy shop, and I would come in to play it, in the morning you say there are 12 numbers of the 78 drawn out?

A. Out of the 78, yes, sir, 12 drawn in the morning.

Q. There is 12 numbers drawn?

A. Yes, sir.

Q. Suppose I want to play the morning lottery, I come into your place and I want to choose three numbers—

A. Yes, sir.

Q. Now, explain how that would be done to the jury,

and carry that whole transaction through?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court counsel for the defendants at the time excepted.

A. Why, the party coming in, as I said, simply selects what numbers he wants to play, say three numbers.

Q. First selects any number from one to seventy-eight?

A. Yes, sir; he selects 10, 20 and 30; these are placed upon a little slip of paper which is given to the bidder as his security to represent a ticket, they are then placed—

Q. Coming back, not quite so fast, I come into your place of business and choose 10, 20 and 30, how is that number, if it is, is it recorded in the office?

A. It is recorded in the office, yes, sir.

Q. How?

A. On manifold paper.

Q. What did you say was done?

A. The ticket is given—a slip of paper is given to the player with those numbers on.

Q. Go on?

A. Under the former administration of their affairs, two of these manifold sheets were returned to the head office and one kept by the vendor and after the drawing—

Q. They were returned to the head office at what time in the day?

A. Prior to the drawing of the lottery.

Q. At what time in the day was the lottery drawn?

A. Five minutes of twelve at that time, and five minutes to five in the evening.

Q. They were returned to headquarters prior to that time—what was done? Go on with it.

A. Then after the drawing they usually telephone some portion of the country and telegraph to others the result of the drawing; copies are kept in the main office by which these tickets are looked up, plays that come from this office that I speak of; if there are any winning numbers—if John Smith's ticket has some winning numbers on it, they are placed in an envelope with the money and a list of the winning numbers in the envelope with the money and it is sent to that vendor to distribute to the parties who made the plays—the winning play—sent to the vendor who turned it in.

Q. That is the rule when the numbers win?

A. If they don't win, of course, nothing is sent except a copy of the drawing where they see the winning numbers.

Q. What is the nature of a copy of this drawing?

A. There were two forms—

Q. I want you to describe how it was printed?

A. It was printed on a piece of square paper about that long.

Above question and answer objected to by counsel for defendants.

The Court: What are you referring to?

A. To the official numbers—the official drawing—to the scheme of lottery.

The Court: The court is permitting this witness to describe what the game of policy is, and if that is a part of the description, you may proceed.

Counsel for the defendants except to the above ruling of the court.

A. Printed on a square piece of paper about that size (indicating).

The Court: This witness is here practically as an expert to explain what the game of policy is.

A. Printed on a piece of paper, I should imagine, about 8x10; the upper row of numbers on that slip of paper, the numbers are as they come from the wheel, the under row are placed in numerical order, to make them easier to look up the numbers on the wheel.

Q. This official notice of this drawing is merely a memorandum of the drawing, the 12 numbers printed on the piece of paper?

A. Yes, sir.

Q. Both printed in the way they come from the wheel and underneath in their numerical order?

A. Yes, sir.

Q. Is there any mark to indicate it is a morning drawing?

A. Yes, it is known as a class number.

Q. How is that class number always marked?

A. My recollection is, in the morning, it is an odd number, and in the evening it is an even number; I think for instance, 275 in the morning, following that is a class 276 in the evening, the drawings were classified in that way.

Q. Please state again how the drawing is made?

A. Placing the numbers in the wheel?

Q. Yes, state fully.

A. The numbers are printed on a small piece of paper, about 2 1-2 by an inch and one-half, I should imagine, and that is rolled up into a small form and placed in a hollow tube—from one to seventy-eight; these are placed in a glass wheel, which is revolved by the party drawing the lottery until it thoroughly mixes these numbers; then as

I said, 12 of them are drawn out in the morning, and 13 in the afternoon or evening.

Q. Go back again to the shops, where these vendors, as you call them, when they send their numbers to headquarters, the tickets they sell, how is it known at the office who sold those numbers, &c.?

A. During my connection with the business here, they were numbered.

Q. Each policy vendor had a number?

A. Each book was numbered.

Q. The names were not written?

A. No, sir.

Q. Going back to the supposed policy game that you and I have been speaking about, 10, 20, 30, if that was sold to me, and your numbers would happen to be 41 or 21 or 28, that number would be placed upon the ticket, would it or would it not?

A. Whatever number you select.

Q. Would be placed upon the same ticket with the numbers on it?

A. Yes, sir.

Q. Where were these drawings made when you were in the business, Mr. France?

A. They were made in Covington, Kentucky.

Above question an danswer objected to and objection sustained.

Q. What does that indicate to you—what would you say it was, Mr. France (showing witness a ticket)?

The above question is objected to by counsel for the defendant, and the question is withdrawn for the present.

Cross-examination:

By Mr. Shay:

Q. Mr. France, you say it is four years since you have had any connection with the business?

A. I think about that time, yes, sir; four years.

Q. Your connection, if I understand you correctly, terminated about a year prior to the trial of the case of France and others, in this court?

A. No, sir; it was after that.

Q. You were tried in this court room, how long ago?

A. I don't remember, Mr. Shay, I think about 4 years ago, is it not?

Q. You were convicted of an unlawful conspiracy at that time?

A. Yes, sir.

Q. And the judgment subsequently was reversed?

A. Yes, sir.

Q. How soon after that did you retire from the business?

A. I think it was several months, 7 or 8 or 9 months. within that year, I think.

Q. Since that time you have been engaged in what?

A. I have been engaged in painting, art work.

Q. Painting and art work?

A. Yes, sir.

Q. You have had no interest either directly or indirectly in the business?

A. No, sir.

Q. I didn't hear your answer.

A. No, sir.

Q. You have not been at any place where the business has been carried on?

A. No, sir.

Q. If it is carried on you only know it by general report?

A. I don't know anything about it at all, sir; I never heard anything about it except what I see in the paper occasionally.

Q. I wish you would be as accurate as you can about the time that you retired from that business.

A. I have the worst memory in the world for dates; my recollection is between 3 and 4 years.

Q. Between 3 and 4 years?

A. I think so.

Q. It is surely over 3 years?

A. I think so, Mr. Shay. What was the date of that trial, sir? I can fix it possibly by that.

Q. I can give it to you in a few moments, if you let me have that record. The 10th of February, '96, the case was tried; the indictment was found, I think, in the fall of '95.

A. Well, it was probably longer than a year after that; something following the second year after that.

Q. You say the business when you were engaged in it was first drawing out of the wheel and tickets were sold—

A. No, sir; that was some years ago, tickets have not been sold, I do not suppose, sir, for 25 or 30 years.

Q. For how many years since there was any ticket or paper writing representing any chance in a lottery sold?

Mr. McPherson: He said about 25 years.

A. I should think it has been that long since they abolished the ticket system.

Q. You said if a man came to play with the vendor—that is what you call him, is it?

A. Vendor we call him, yes, sir.

Q. That he would give to the vendor such a list of numbers as he wanted to play?

A. That was the general custom, I believe.

Q. Do you mean the man that was going to play would make out that number?

A. Sometimes he did and sometimes he just gave them numbers and they put it on a piece of paper—a great many of them would not even write the numbers.

Q. And did he give any money with it?

A. I presume so.

Q. You presume so?

A. Money or credit, possibly, I don't know; I was only stating the modus operandum; I didn't see those acts myself at all; I didn't state that I saw them.

Q. Do you know Mr. Pelton?

A. Yes, sir.

Q. Mr. Pelton came to see you?

A. Yes, sir.

Q. About this case?

A. Yes, sir.

Q. When was he to see you?

A. I think it must have been about 2 or 3 months ago.

Q. And requested you to come over and give testimony?

A. He asked me if I would give testimony here.

Q. You haven't paid Mr. Pelton anything for this prosecution?

A. No, sir.

Q. And he has not paid you anything?

A. No, sir. If I may be allowed to state it, I came here as a very reluctant witness, sir; I think the attorneys on the other side can tell you that.

By Mr. Pherson:

Q. You were subpoenaed here by the United States Marshal?

A. I sent a doctor's certificate, sir, excusing me on account of my health and the surgeon of this court came and examined me and compelled me to come in attendance.

Q. Mr. Shay asked you if you were not convicted of this crime in the year '96 and afterwards the Supreme Court reversed it?

A. Yes, sir.

Q. I will ask you if Mr. Reilley was not also convicted at the same time with you?

Above question objected to and the objection taken under advisement.

Q. What, if any, interest have you, directly or indirectly, in the policy or lottery business?

A. At the present time?

Q. Yes, sir.

A. None in the world, sir.

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Charles Pelton, being called by the government and sworn, testifies as follows:

By Mr. McPherson:

Q. Give your name to the jury?

A. Charles Pelton.

Q. Where do you live, Mr. Pelton?

A. Millford.

Q. Ohio?

A. Clermont county.

Q. What is your business and occupation at this time?

A. I am agent of the Municipal Reform League of Cincinnati and vicinity.

Q. How long have you been agent of that league?

A. Five —— years ago the first of last October.

Q. Are you acquainted with Charles Reilley?

A. Yes, sir.

Q. Do you know John Edgar?

A. Yes, sir.

Q. Do you know Mr. Hoff, Anthony Hoff?

A. Yes, sir; I have a slight acquaintance with him.

Q. Do you know John Francis?

A. Well, I knew John Prior; there is some doubt about his name, I understand; I have a very slight acquaintance with him.

Q. The gentleman is indicted under the name of John Francis?

A. Yes, sir.

Q. The man who sits here as one of the defendants with his counsel?

A. Yes, sir.

Q. How long have you known Mr. Reilley?

A. Five years.

Q. Where is Mr. Reilley's place of business?

A. In the rear of Drury's Hotel on Sixth street, opposite here.

Q. Opposite here—whereabouts?

A. On Sixth street.

Q. Sixth street where?

A. The north side of Sixth street.

Q. What city and state.
A. Cincinnati.
Q. What state?
A. Ohio.
Q. Hamilton county?
A. Yes, sir.
Q. What business is Charles Reilley in?
A. I have known him conducting the policy business at this place.
Q. How long have you known him doing that?
A. During these 5 years.
Q. Was he conducting the policy business during October of last year?
A. Yes, sir.
Q. You may state what is your source of knowledge with reference to Mr. Reilley being in the policy business.
A. Personal observation.
The above question and answer is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court counsel for the defendants at the time excepted.
A. I speak from personal observation, every month of these five years, almost every week, seeing him at his appropriate place at certain hours, in the policy business, down to the last month.
Counsel for the defendants moves the court to strike out the whole answer of the witness, the court overrules the motion, to which ruling of the court, counsel for the defendants at the time excepted.
Q. Do you know John Edgar?
A. Yes, sir.
Q. How long have you known him?
A. Five years.
Q. What is his business?
A. He is a policy carrier from Newport; a canvasser of the books when they come in from the shops twice a day to headquarters over Mr. Reilley's shop.
Q. Where is the headquarters?
A. In the adjoining building to Mr. Reilley's shop; having connection up to last October through a hole in the brick wall; the only safe on the premises being in Mr. Reilley's shop.
Q. How did they enter this room?
A. They generally come to Mr. Reilley's first and the books were delivered there—I should not say that last, because I was not personally cognizant of that.
Q. Not personally cognizant of that—of what?
A. The delivery of the books by the carrier—they vis-

ited Mr. Reilley's shop though first, then went into headquarters department through a shoe store which occupies the front part of the lower store, up the stairway in the rear through this hole in the wall to the upstairs room.

Q. How is that hole in the wall made?

A. Just chiseled through the bricks.

Q. From these upper apartments into Mr. Reilley's place of business?

A. Mr. Reilley's on to this stairway, up which the canvassers always went to the headquarters room?

Q. You say that John Edgar is a carrier?

A. Yes, sir.

Q. What do you mean—explain to the jury particularly what you mean by that?

Above question objected to.

The Court: The question can be modified so as to call for the knowledge of the witness as to what he was carrying.

Q. As a carrier, what did John Edgar do?

The above question is objected to by counsel for the defendants, the court overruled the objection, to which ruling of the courts, counsel for the defendants at the time excepted.

A. Between 11 and 12 in the forenoon and 4 and 5 in the afternoon he visited the several shops which constituted his route before going to headquarters, and that is his duty as a canvasser.

Q. What do you mean by shops?

A. Policy shops.

Q. What is a policy shop?

A. A place where bets are received on the prospective winning numbers.

The above question and answer objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court, counsel for the defendants at the time excepted.

A. It is a place where the policy writer accepts bets, in the form of a ticket. I can produce one obtained by myself, on which are written 3 or more numbers which constitute my choice of what will be the next winning numbers on the next official print, bearing the winning numbers from headquarters.

Q. These are the tickets that are sold at these shops, you speak of, as policy shops?

Above question objected to and sustained.

Q. What did you say these tickets were?

A. Copies of policy bets by patrons of the policy shop.

Q. Who made these copies?

A. Which one?

Q. These particular copies? Well, I will withdraw those, if you please. Who made these, if you know (showing witness slips of paper containing writing)?

A. Well, I can not be sure about those two.

Q. You don't know?

A. I know who made this. (Indicating a paper).

Q. If you have any recollection at all who made those two, I wish you would state?

A. I would not state with any certainty as to either of these, but they are written by the patron of the shop.

Above answer objected to.

Q. This ticket I hold in my hand, is what?

A. It is a policy ticket from Henry Cutter's shop on Vine street.

Counsel for the defendants move the court to rule out the above evidence of the witness in regard to the tickets, and the court instructs the jury as follows:

"For the present, at least, gentlemen of the jury, this paper is simply allowed to go into evidence, as illustrating what is meant by what the witness speaks of as a ticket, not for any other purpose, and it has no other relevancy for the present, at least, to the case."

By Mr. Shay: As to the answer will your Honor permit it to stand?

The Court: Yes; it don't matter where it was made, or what shop it was made.

Mr. Shay: We will reserve an exception.

Said paper offered in evidence by counsel for the government, and marked "Exhibit No. 1—J. A. C."

Q. Now, Mr. Pelton, you may take this ticket, marked "Exhibit 1" and explain first that figure at the top—these letters and figures at the top—what that means?

A. The first is Col., for Colorado, representing the Colorado Policy Lottery system, which is a rival to the one we are at now. Serial numbers 192—the form of these official prints, have you that in evidence yet?

Q. No.

A. If issued each day, you see the simple date would not be sufficient, so they begin with the first of January with the serial number and continue that through the year, and the even number always indicates the afternoon drawing on the top of the official print, and the odd number indicates the morning drawing.

Q. The serial number indicates the drawing forenoon or afternoon?

A. Yes, sir; and to one who keeps track of it, as we do, you can tell the date by the serial number, for they go continuously through the year. Now, the morning ticket shows 12 winning numbers, in the afternoon 13. In the morning I have tickets from this same place, where 10 cents—10 means the amount paid by this patron, 10 cents G, and the 16 means gig, that is, if you guess three numbers of the 13 in the afternoon, gig and $16. 10 cents will win $16 if the patron succeeds in guessing 3 out of the 13.

The Court:

Q. What do you mean by "gig"?

A. Well, sir; I don't understand the etymology of the term; it is a policy term.

Q. What does it signify?

A. It signifies a winning. Gig and 16—a successful guess of the winning numbers constitutes a gig, I understand. In the morning the tickets are written "gig and $20," as the result of guessing three out of the twelve winning numbers for ten cents.

Q. Now, this, you, say, calling your attention again to the 10, represents the amount of money paid?

A. Yes, sir.

Q. What is it that represents that interest or chance in the lottery?

Above question objected to.

Q. What is it that represents the interest of your 10 cents that you paid into that shop or policy, or what you paid?

Above question objected to.

The Court: Let him explain what each figure or letter or combination of figures or letters upon that paper means.

Mr. McPherson: I thought he had done that, Your Honor.

Q. Proceed and explain that again.

A. The Col. at the top means the Colorado system of policy lottery; 192 represents the serial number of that system during the year, showing that it was issued in the afternoon of a certain date; the three numbers, 12, 28, and 51, which follow, constitute the guess of the patron who offers this ticket that such numbers, in his judgment, will be issued that afternoon from this policy system.

By the Court:

Q. Drawn?

A. Yes, sir; drawn from the headquarters. This policy agent that wrote this ticket, puts down "G," which I understand is an abbreviation for "Gig," $16. Then the 10—

Q. $16?

A. Yes; that represents what will be won if the patron is successful in guessing three out of the 13; and they always mark the amount paid in this way (indicating), the number of cents paid with a scribe around it.

Q. What is there on that paper to indicate what is paid?

A. 10 cents is the amount of the interest as represented in the three numbers, which he hopes will be issued.

Q. I was asking what represents the amount paid—the figures 10?

A. The 10 in the circle represents the bet, the amount of the bet.

Q. What is this ticket?

A. It is a policy ticket.

Q. When is this issued?

A. February 24th, '98.

Q. In reference to the drawing—before or after the drawing?

A. Afternoon before four o'clock.

Q. Before or after the drawing?

A. Before the drawing.

Q. State whether or not, Mr. Pelton, the man who goes in to bet or to guess or to choose these numbers and deposit his money, is there any other evidence that he has deposited and bought this ticket except this ticket?

Above question objected to and sustained.

Q. State what they give the player—what the vendor of the policy tickets gives the person who buys it—what evidence—what paper, as evidence of his bet do they give him?

Above question objected to and sustained.

Q. What is given to the policy player as the evidence of the amount he plays, if anything?

Above question objected to.

Q. What, if anything, is given to the policy player as evidence of the amount he invests?

Above question objected to.

Q. When a man goes to a vender's policy shop and buys or chooses three numbers and invests ten cents, what is done by the vendor?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which

ruling of the court, counsel for the defendants at the time excepted.

A. In all the shops, with one exception, that I am acquainted with, the patron finds a shelf or table, with such pieces of paper as this blank paper; he makes out his ticket, writing the official number of the system at the top; if it is the system that is in this case, if he wanted to bet in the Kentucky part of it, he would put a "K" at the top, then write his three or more numbers under it and the amount paid below that, and make a duplicate of it, one he hands in with his money and the other he retains so as to compare with the official print when he returns, to see if he has won. There is nothing given by the agent.

Q. What does that paper represent, or such paper purport to represent?

Above question objected to and sustained.

Q. You stated, Mr. Pelton, that the player, when he chose his numbers, he generally made a copy and handed one copy to the vendor with his money and kept the other?

A. Yes, sir.

Q. What is done with the money and copy retained by the vendor?

The above question is objected to by counsel for the defendants, the court rules that the witness may answer the question, if he knows, to which ruling of the court counsel for the defendants at the time excepted.

A. About the time they close up the transactions for that half day, each vendor makes what is called a book, that is, a record of these individual bets, with the amount and the numbers that book is taken up by the carrier at the proper time, between 11 and 12, and taken to headquarters to be canvassed, where they receive a slip with the winning numbers of that half day and compare it with these individual bets. In case of a winning, a record is made of the winning and the winning sent back.

Q. What do you call a book?

A. That is simply a record; it is called a book in the policy parlance—a record of each individual bet which conveys the person's interest to headquarters.

Q. Do you know the defendant Hoff?

A. I have a slight acquaintance with Mr. Hoff.

Q. Where is his place of business, or was it in October of last year?

A. On Saratoga street, Newport, Kentucky.

Q. State what you know about Mr. Hoff in reference to the policy game?

The above question is objected to by the counsel for

the defendants, the court overrules the objection, to which ruling of the court, counsel for the defendants at the time excepted.

The Witness: Is it proper for me to state my information?

The Court: No; your personal knowledge.

A. Being satisfied that Mr. Hoff is engaged in this business—

Above answer stricken out.

The Court: Just state what you did learn from personal observation from matters that came within your personal knowledge?

A. I accompanied two officers who visited Mr. Hoff's shop about 11 o'clock, October 4th, last, where we found official prints, quite a package of them, and copies of policy plays, and where he admitted in my presence that he had accepted policy bets and sent them over the river to headquarters. He made this statement in my presence.

Counsel for the defendants move the court to rule out the last answer of the witness, the court refuses so to do, to which ruling of the court, counsel for the defendants at the time excepted.

Q. Can you identify the papers that you found in his house that day?

A. I am not sure that I could, absolutely.

Q. Who was with you when that raid was made?

A. Lieut. Labreth and another officer of the Newport police.

Q. What other officers besides Labreth?

A. I don't remember his name, now.

Q. What was done with the papers and official printing, &c., found in Hoff's possession or place of business that day?

A. They were delivered—

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court, counsel for the defendants at the time excepted.

A. They were delivered to the Chief, Schilling, of the Newport police. They were deposited in the safe, he informed me.

Q. Lieut. Schilling died sometime ago, did he not?

A. Yes, sir.

Q. About when, do you know?

A. February.

Q. Do you know what officer succeeded him?

A. Lieut. Smith, I believe.

Q. Of Newport?

A. Is in his place, yes sir.

Q. Do you know the defendant, John Francis?

A. I have a slight personal acquaintance with him.

Q. When was the first time you ever met that gentleman?

A. Well, it is some two years ago.

Q. To be accurate, as near as you can, Mr. Pelton, is it two years yet?

A. Well, I received information—

Above answer objected to.

Q. State under what circumstances you met him?

The above question is objected to by counsel for the defendants, the court overruled the objection, to which ruling of the court, counsel for the defendants at the time excepted.

A. My attention was called by a citizen to room 64 of the St. Paul building, with the statement—

Mr. Shay: I object.

Q. Don't state what was said—what did you do?

A. I began to pay attention to those entering the St. Paul building at certain hours.

Q. Room 64, you say, what did you do in reference to room 64?

Above question objected to.

Q. What did you observe in reference to room 64 in the St. Paul building?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court, counsel for the defendants at the time excepted.

A. I visited this floor and took observations on that room.

Q. First, what sign was there up over the door, if any?

A. Cannel Coal, and some other name of coal, Bird's Eye Coal, I think. I found the door locked invariably; I observed Mr. Francis go in and three well known policy men at 11 o'clock, and Mr. Francis generally went in a few minutes before, the others quite promptly to go in within 5 minutes before or after 11 o'clock each afternoon and four o'clock each afternoon.

Q. Who were the three other gentlemen?

A. Mr. Spencer, a policy agent on Vine street—

The above question and answer is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court, counsel for the defendants at the time excepted.

A. I accompanied the officers and visited this place; Mr. Henry Myer, of 113 E. Third street, who has 12 shops of the same system, 10 or 12 under his care, Mr. Bickel; these three accompanied Mr. Francis. They stayed in there an hour. The first to issue from that door was Mr. Francis, as a rule; several times I traced Mr. Spencer as the first one who came out, and he went directly to the office of the Western Union Telegraph Company, but most of the times of these observations, in the last year or year and one-half, Mr. Francis.

Q. Which Francis?

A. John Francis.

Q. This defendant here?

A. Yes, sir—made that trip.

Counsel for the defendants ask to have the above answer of the witness ruled out as not being competent.

A. In August, '98, I was present with the officers when they raided this room, August 16th, '98, Lieut. Poppy in command of four officers, Mr. Albert L. France was along, and the room has a double apartment, a door between, a vault, a large vault in the inner apartment. Mr. Francis promptly at 5 o'clock, August 16th issued from there as usual, apparently on his road to the telegraph office, the others still inside, and the officers arrested him, and Lieut. Poppy demanded entrance to the rear apartment; they did not give it and he was obliged to burst the door open, and found these three men there—Bickel and Spencer and Myers, and the documents which they obtained was a well bound volume in fine leather, which Mr. Francis is able to explain; I was not familiar enough to be able to explain the significance of the book.

Q. What was the book—you know now, don't you?

Counsel for the defendants ask that the above answer be ruled out, as not being germane to the issue, the court refuses to rule said testimony out, to which ruling of the court, counsel for the defendants at the time excepted.

The Court: If later in the progress of the case, I am convinced that it is irrelevant, I will probably advise and instruct the jury in relation to it.

The Court: Where is the book?

A. Lieut. Poppy thinks that it is still in the police department, and if he was excused he could get it.

Q. Have you been observing and do you know who comes out of the St. Paul building and goes to the Western Union Telegraph office, if anyone, or who did, in October of last year and previous to that time?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which

ruling of the court, counsel for the defendants at the time excepted.

A. John Francis; I saw him on the third and on the fourth of October.

Q. Did you watch him?

A. Yes, sir.

Q. At what hour?

A. At noon—5 minutes of 12 o'clock.

Q. 5 minutes of 12 o'clock?

A. Yes, sir. He went through the usual movement to go right back to the receiver to the rear room at the north end of the apartment, handed in a paper and immediately returned to the St. Paul building.

Q. Previous to room 64, do you know what room was occupied by Mr. Francis and these other gentlemen you speak of in the St. Paul building?

A. I am not sure of the number. I am aware that they ooccupied another room before this; that was, at least, two years before.

Q. Is that room still being occupied in the St. Paul building by the defendant, Francis, and others?

A. 64?

Q. Yes, 64?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court, counsel for the defendants at the time excepted.

A. I can not state within thirty days myself.

Q. Prior to thirty days from now?

Above question objected to.

A. I would not be justified in asserting that it was so occupied recently.

Q. Were you ever with the officers of this city when a raid was made upon Mr. Reilley's place of business on Sixth street?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court, counsel for the defendants at the time excepted.

A. Many times.

Q. How many times, if you know?

Above question objected to.

Q. Approximately?

A. I would say, at least, a dozen times.

Q. Within what period would you fix that dozen times?

A. In these five years.

Q. What, if anything, was found in his place upon those raids?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court, counsel for the defendants at the time excepted.

A. Always found a package of official prints, which characterized a policy shop as a chief feature always. Nobody gets packages of these official prints except the policy agent.

Counsel for the defendants move the court to rule out the above answer, the court refuses so to do, to which refusal of the court, counsel for the defendants at the time excepted.

Q. These official prints that you speak of, are they the drawings that come out of room 64 in the St. Paul building?

Above question objected to and withdrawn.

Q. State if you know where these official prints found in Reilley's place, came from.

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court counsel for the defendants at the time excepted.

A. I knew of a good many of them. They came from Mr. Kyle's printing office on Madison Avenue, Covington, repeatedly; I was with the officer when he arrested the carrier on his wheel; he captured over 40 of them one day, and have traced them repeatedly; they came from Mr. Brombeck's printing office, with headquarters on Fourth and Main, and a great while on Main Street; they have been printed in 2 or 3 years at various places.

Q. Who authorized the printing of these tickets, if you know?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court counsel for the defendants at the time excepted.

A. I could not say from any personal knowledge.

Q. State where are these official prints that you took from Mr. Reilley's place.

A. I understand they are in possession of Chief Schillings' successor, Chief Smith.

Q. Those were found at Hoff's place?

A. Yes, sir.

Q. I am speaking of Mr. Reilley's?

A. Well, the police department are accustomed to preserve them for a number of months, then destroy them.

The Court: He is simply asking you if you knew where they were.

A. Some of them, I have no doubt, are in possession of the police department of Cincinnati.

Q. Well, you don't know?

A. No, sir.

By Mr. McPherson:

Q. Can you state what were on these official prints found in Reilley's place—what letters, as matter of identification?

A. Yes, sir.

Mr. Shay: I object.

Q. Do you know a man named Richmond?

A. Yes, sir.

Q. What is his first name?

A. Morris.

Q. Where does he do business?

A. On Sixth Street.

Q. What business is he in?

A Paint business—in a paint store.

Mr. Shay: I object.

Q. What other business has Mr. Richmond besides the paint business?

The Court: Is he one of the defendants?

Mr. McPherson: No, sir, one that we claim was in this conspiracy, but not indicted.

The Court: The hour of adjournment will arrive before you finish this witness, so pass that.

Q. Who is Mr. Harrison?

Above question objected to.

A. Mr. Harrison is one of our agents.

Q. What is his first name?

A. H. T. Harrison.

Q. Where does he live?

A. In Bellevue, Kentucky, I believe, or Dayton, Kentucky.

Q. You speak of one of your agents, is he one of the agents employed by the Municipal League?

A. Yes, sir.

Q. Who is Mr. Price?

A. He is his associate.

Q. Where does Mr. Price live?

A. Newport.

Q. Newport, Kentucky?

A. Yes, sir.

Q. I will hand you a book, Mr. Pelton, state if that is the book you found in the raid of the St. Paul Building, Room 64, that you alluded to in your testimony before dinner?

Above question is objected to by counsel for the de-

fendants, the court overrules the objection, to which ruling of the court counsel for the defendants at the time excepted.

A. I decide that it is.

The Court: When was it found there?

A. The 16th of August, '98.

The Court: Do you propose to offer this in evidence?

Mr. McPherson: Yes, sir.

The Court: Show it to the other side.

Mr. McPherson: I do not propose to offer it in evidence until I call Mr. France back upon the stand.

Q. State what you know about Room 64 in the St. Paul Building having a telephone in it.

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court counsel for the defendants at the time excepted.

A. Yes, sir, it has the ordinary Bell Telephone.

Q. State what you know about the room in the headquarters up over Rielley's place having a telephone in it.

Above question objected to and sustained.

Q. Is there a telephone in the room that you have testified to in the building up over Reilley's place on Sixth Street?

The Court: That is the very thing that is objected to. I do not remember whether the testimony located Reilley's room in any particular building?

Mr. McPherson: Yes, sir.

The Court: Did it?

Mr. McPherson: Yes, sir.

The Court: What building?

Mr. McPherson: In the rear of Drury's Hotel.

The Court: What room have you reference to?

Mr. McPherson: Mr. Reilley's.

Q. If there is a telephone, state where it is.

A. In the headquarters of the Kentucky Policy Lottery for canvassing books.

Q. Where is that in relation to Mr. Reilley's room?

A. Next door.

Q. How is it connected with Mr. Reilley's room?

A. Through a hole in the wall—in the brick wall.

By Mr. Shay: Is the telephone connected by the hole in the wall?

A. No, the rooms are connected.

Q. State if either of these telephones are given in the telephone directory.

A. No, sir. Neither the St. Paul telephone nor the headquarter telephone—the canvassing room.

Q. Mr. Pelton, have you ever made an investigation as to the chance of winning in reference to policy, as you have described it?

Above question objected to and sustained.

Q. State, if you know, in the year '99, where these official numbers were printed, that you have been describing to the jury.

The above question objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court counsel for the defendants at the time excepted.

Q. Do you know where they were printed?

A. Yes, sir, at one place, at Mr. Kyles, 529, I think, is the number, Madison Avenue, Covington.

Q. Kentucky?

A. Yes, sir.

Q. State, if you know, how they were delivered, if at all, to Mr. Reilley's place of business.

Above question objected to.

Q. From that printing office?

Above question objected to.

The Court: I am assuming that the evidence will be offered after while to connect these defendants with that transaction or these transactions; it is upon that theory that I permit it to go in. Answer the question.

Counsel for the defendants except to the above ruling of the court.

A. They were brought, mostly under my observation, by a young man named Frazier on a wheel—

Q. On what?

A. A bicycle and delivered to Mr. Reilley, and by him distributed to these carriers—the various carriers.

Q. By whom distributed?

A. By Mr. Reilley, and I had the young man taken up on one of his trips by the officers and this bunch of official prints confiscated; in the meantime the carriers waited two hours to receive those prints in the neighborhood of Mr. Reilley's.

Counsel for the defendants move the court to rule out all the above testimony in relation to the prints, the court refuses so to do, to which refusal of the court counsel for the defendants at the time excepted.

Cross-Examination.

By Mr. Shay:

Q. You say that these men were waiting for two hours at the time of the arrest—were you present at the time of the arrest?

A. Yes, sir.

Q. Did you go with the officers when the arrest was made?

A. It was made on Main Street near—

Q. Answer my question, please. Did you go with the officers at the time of the arrest?

A. Yes, sir.

Q. Where did you go to?

A. On Main street, opposite the Hammond Street Station.

Q. Who was arrested?

A. Mr. Frazier.

Q. Did you see anybody waiting on the outside then?

A. Outside where?

Q. Where the arrest was made?

A. The arrest was made on the street of this man on the bicycle.

Q. Where did you say these men were waiting?

A. At Reilley's shop.

Q. Did you see them waiting there?

A. Yes, sir.

Q. When?

A. After this arrest.

Q. How long after the arrest?

A. Until 2 o'clock.

Q. Well, until 2 o'clock?

A. Yes, sir.

Q. What time was the arrest made?

A. 12:45.

Q. What time did you go there?

A. Very soon after.

Q. Well, how soon after?

A. Well, within half hour.

Q. Within a half hour?

A. Yes, sir.

Q. Who did you see there within that half hour?

A. I saw James Star, John Edgar and William Miller and Charlie Lawrence.

Q. Where did you see them?

A. In the neighborhood of Reilley's shop.

Q. Did you speak to them?

A. No, sir.

Q. Then it is a surmise in your mind, what they were doing there, is it?

A. Yes, sir, I had seen them—

Q. It is simply your opinion, is that it?

A. I had seen them so many times.

Q. Answer my question please—is it simply your

opinion that that was their object in being there?

A. I said it was my surmise.

Q. Well, that is your opinion, is it?

A. You might so construe it.

Q. Now, you say that this occurred when?

A. Last summer.

Q. What time last summer?

A. I am not accurate in recollection of the exact date.

Q. Where did you make the memorandum at?

A. I have it in one of my note books, but not at present with me.

Q. What book—what note book?

A. I have it at the office.

Q. Haven't you looked at it?

A. I don't recollect that I noticed the date recently.

Q. Was it as early as June?

A. It may have been.

Q. What direction was Frazier going at the time of his arrest? On what street?

A. Going north on Main Street. We took him, just after he turned off of Third Street.

Q. Who do you mean by "we"?

A. I was with an officer.

Q. What officer?

A. An officer from Hammond Street Station.

Q. What was his name?

A. I don't remember his name.

Q. And took from his person certain papers, did you?

A. The officers in searching him at the Hammond Street Station, found these papers.

Q. Did he say where he got these papers?

A. No, but—

Q. Did he say where he got them?

A. No, sir.

Q. You don't know where he got them or who gave them to him?

A. Not of my knowledge.

Q. Nor how long he had them, do you?

A. No, sir.

Q. Did you ever see Mr. Reilley distribute any papers?

A. I could not say so definitely; I don't have a clear recollection of his distributing papers.

Q. Then when you made the remark that Reilley was the distributor that was your opinion also, was it—your surmise?

A. It might have come somewhat from the report of

the other agents—that part of it.

Q. But as to your actual personal knowledge, you haven't any?

A. I saw Mr. Frazier deliver them to Mr. Reilley.

Q. Did you see him go into the place?

A. I saw him deliver them in the alley.

Q. Deliver what in the alley?

A. Package of official papers.

Q. Do you know what was in that package?

A. Well, I didn't inspect very closely.

Q. Did you look at it at all?

A. I looked at the package, of course.

Q. Did you open the package up?

A. No, sir.

Q. Then you can not swear what was contained in that package?

A. Not from close personal observation.

Q. Then the whole matter of your saying that Reilley distributed was made up from the fact that you saw Frazier at some time give him a package in the alley?

A. Yes, sir.

Q. But what was in that package, you don't know?

A. Only from the results which we obtained after arrest.

Q. Then the fact that you say that Mr. Reilley is a distributor is made up from another fact—

A. Well, Mr. Reilley had charge of the whole operation there at headquarters.

Q. On what do you base your opinion?

A. From observation.

Q. But not your knowledge of any particular act that Reilley did?

A. Yes, sir.

Q. What act did he do?

A. Well, he patrolled the neighborhood for one thing and had others under his direction.

Q. Did you see him direct anybody?

A. Yes, sir.

Q. Who did he direct?

A. I could not name them.

Q. What did you tell him to do?

A. I could not say.

Q. Then you don't know? You don't know what direction he gave to anybody?

A. Not his verbal directions.

Q. Then it is a surmise on your part that he gave them directions, is it?

A. Well, I would say that I had more than that.

Q. What more have you than that?
A. These men reported to him evidently.
Q. What do you mean by evidently? Is that your opinion?
A. Hood Irwin, for instance.
Q. Is that your opinion?
A. It is the result of my observation.
Q. What did they report to him?
A. He would send them out to patrol different—
Q. What did Mr. Irwin report to him?
A. Well, he reported in a sense of coming up in person.
Q. Did you hear him?
A. I saw it.
Q. Do you know what he said to him?
A. No, sir.
Q. You don't know what they were talking about?
A. No, I was not close enough to hear.
Q. It is a surmise on your part, is it?
A. I could see him report without hearing the words.
Q. Answer my question. Is it a mere surmise on your part?
A. I think it is more than that, sir.
Q. But that is all the knowledge you have then by noticing the men come and some talk between them, your opinion is that they were getting reports or directions, is that it?
A. I was repeatedly with the officers who were raiding this place, and Mr. Reilley was certainly in charge of the premises.
Q. He was on the premises?
A. In charge of them—recognized as such.
Q. Was there any business there?
A. No, sir.
Q. Was there a sign of "Coal Office" there?
A. Not that I know of.
Q. Such a thing may have been there and you know nothing about it?
A. There might have been a sign.
Q. Did you ever play policy there?
A. Yes, sir.
Q. When?
A. Early in my acquaintance with the place.
Q. How early in your acquaintance?
A. Well, I began 5 years ago this month.
Q. Was it 5 years ago that you played?
A. I began then, I said.
Q. 5 years ago was it that you played there?

A. Sir?

Q. When was it that you played there?

A. I played there 5 years ago, and several times months after that.

Q. Well, 4 years ago, was that the last time?

A. Yes, sir.

Q. Who did you play with?

A. Mr. Reilley.

Q. Anybody else?

A. Yes, sir.

Q. Who?

A. A colored man, I don't remember his name.

Q. Have you played it any time within the four years?

A. Well, I rather think I did.

Q. You did?

A. Yes, sir.

Q. How long ago?

A. But not within 3 years.

Q. Not within 3 years?

A. No, sir.

Q. Well, now, then you say that there was a telephone?

A. In the headquarters room.

Q. Well, were you ever up stairs in that room?

A. Yes, sir.

Q. Did you ever do any business with anybody there?

A. I was present on two raids in that room.

Q. What do you mean by two raids?

A. When the officers entered that headquarters room.

Q. At your instigation?

A. Well, I assisted them in planning it.

Q. Well, at the time of the raids—at any other time than the raids, were you ever there?

A. Not in the headquarter room.

Q. Was there anything being done at the time of of the raids by anybody in that room?

A. Well, of course, the raid interrupted—

Q. Do you know whether it interrupted anything or not?

A. Evidently it did.

Q. How?

A. Evidently it did.

Q. Do you know that of your own knowledge?

A. What they did just before, I could not say.

Q. Well, they may have been doing nothing before that, sir?

A. That is not likely.

Q. Well, you don't know, do you?

A. I repeatedly watched these same men—

Q. But, do you know whether they were doing anything there or not?

A. Not on these occasions, I could not say.

Q. Then as a matter of fact you never saw anything done in that room?

A. I saw the capture of these men.

Q. Except the capture of the men when you came there?

A. And the documents—policy documents.

Q. That is all you ever saw is it?

A. In these headquarters; yes, sir.

Q. And the word headquarters then is simply a term applied to it by you?

A. Well, I was very well satisfied from my deduction—the results of the arrest warranted it.

Q. Other than your own deductions from the facts, you have no other means of calling it headquarters?

A. Yes, sir; the papers were captured on the raid.

Q. Have you any of these papers?

A. I have no right to these papers.

Q. Wouldn't that be simply your opinion, after looking at the papers you captured and what you observed, it is your own deduction to call it headquarters, ain't it?

A. Yes, it is my own; it is not somebody's else.

Q. You say there was a telephone there, did you ever try it?

A. No, sir.

Q. You say there was a telephone at No. 64?

A. Yes, sir.

Q. Did you ever try it?

A. No, sir.

Q. How do you know it was a telephone?

A. It has all the appearance of being a telephone.

Q. It had the appearance of a telephone, but whether or not there was a telephone there in existence at the time you saw it, you don't know?

A. I would call it a telephone.

Q. Well, but you don't know—do you know how a telephone is operated?

A. I think so.

Q. Well, how?

A. Is it necessary to answer that? Well, they are accustomed to make a call by the ringing of the bell.

Q. Did you ever hear the bell ring in this telephone?

A. No, sir.

Q. Do you know whether it had a bell or not?

A. That I could not say.

Q. Do you know whether it had a wire connecting it with any place or not?

A. I don't recollect noticing the wire.

Q. Well, do you know whether it had or not?

A. I said it was a telephone instrument—I am sure it was that.

Q. Then, whether or not the telephone had any connection with any place or was anything else than the box, you don't know?

A. There is a good deal I don't know about that telephone.

Q. Answer that question please. Do you know whether it was anything more than a box there?

A. I would call it a telephone instrument. I had no doubt about it at the time; I have no reason to doubt it now.

Q. That was only your opinion then?

A. Yes, sir.

Q. I believe you said something about their being a number of policy places—policy drawings—how many of them did you say there was?

A. I don't recollect saying.

Q. How?

A. I don't recollect saying.

Q. Didn't you say this morning that there was the Colorado and the Paduka?

A. No, sir.

Q. And Kentucky?

A. No, sir; I mentioned Colorado.

Q. Yes, you mentioned the Colorado, and you said that that belonged to some other people, did you not?

A. I don't think I did.

Q. Didn't you say that it was a rival company?

A. Yes, sir; a rival system that is the expression I used.

Q. Well, then, you did speak about other companies did you?

A. No, sir, a system is not a company.

Q. You spoke about rival systems then, you have received money from the rival systems have you not?

A. What do you mean by that?

Q. Have you got money from any source for engaging in this business?

A. Yes, sir, from the Municipal Reform League.

Q. You do the collecting, do you not?

A. Yes, sir.

Q. And you collect about the city?

A. Yes, sir.
Q. Anything that gives it to you?
A. No, sir.
Q. Have you got a list of your Directors?
A. Yes, sir.
Q. Where is it at?
A. I have one in the office.
Q. Where?
A. 420 Elm street.
Q. Can you bring it to us tomorrow?
A. If required.
Mr. Shay: We will ask your honor to require him to bring the book to-morrow.
The Court: I will consider that.
Q. Didn't you this morning in speaking about the matter, did you not in explaining a ticket, or attempting to explain one, say, that if they wanted to play in the Kentucky that they put a 'K'?
A. Yes, sir, the initial of the system is usually put over the bet.
Q. Well, then that represents the Kentucky lottery, does it?
A. So understood.
Q. What other lotteries or policies is there going on?
A. The Kentucky has combined with it, one under the initial 'H' which is understood to refer to the old Henry system, with which it has been associated a long time.
Q. What is the Henry system, if you know?
A. Oh, I don't know, I can not give the distinctions; it is one and the same company, because the exact numbers are always printed on the same sheet.
Q. Is that the only way you know it?
A. Yes, sir; and another series of numbers under the initial 'F' which is understood to be Frankfort, on the same sheet; I have copies of these official prints with me, if you would like to see them.
Q. What other?
A. That is all on that sheet. There is another with the initial 'I' and 'S.'
Q. What is that?
A. It has more recently been introduced; I have been told it was Inter-State & Springfield; the winning numbers are telephoned every day from Chicago. We have raided that persistently; and the other is the old style Colorado, formerly run by Colonel Smith; they have combined and run under the initial P, which is understood to be Paduka—I didn't mention that before—so I understand it.

Q. Where do these drawings take place—for instance the Kentucky and the Henry lottery?

A. I can not say from my own observation.

Q. You never saw one, did you?

A. To sustain evidence which—

Q. I didn't ask you for that—

A. I will state they are drawn in Room 64, St. Paul Building.

Q. Well, do you know?

A. Not from personal observation.

Mr. Shay: Well, then, I ask your answer be ruled out.

The Court: So much of the answer as is based upon information and not personal observation will be stricken out.

Q. Room 64, did you ever find any wheel in there, when you went in to make a raid?

A. I never found or heard of a wheel being associated in that business.

Q. Well, when was the first raid that you made at Room 64?

A. August 16th—last August 16th—no, it was '98, August 16th, '98.

Q. August 16th, '98?

A. Yes, sir.

Q. Who made that raid?

A. Lieut. Poppe, City Detective Kratz and another detective I don't know his name now; two officers in uniforms—Kratz and Roach were the detectives.

Q. Were you with them when they made the raid?

A. Yes, sir.

Q. Were you in the room at the time?

A. Yes, sir.

Q. Let's see if I can not refresh your recollection—don't you remember that at the time the officers went into that room, you were down stairs on the ground floor?

A. No, sir; these two detectives and Mr. France went ahead until Mr. Francis—

Q. Mr. France is the lame gentleman that was here on the stand?

A. Yes, sir.

Q. The same man that was indicted formerly and tried?

A. Until Mr. Francis opened the door, then Lieut. Poppe and his two officers in uniform and myself started up.

Q. Started where?

A. Up to this room?

Q. How did you start up?
A. By the elevator.
Q. Did you see him open the door?
A. I saw him burst in the inner door?
Q. You saw who burst in?
A. Lieut. Poppe.
Q. Who did you arrest there?
A. Lieut. Poppe—arrested—
Q. Who did you see there?
A. Henry Myer, R. B. Spencer, and I think John Bickel was the other man. I am not very sure.
Q. Was that all the persons that were in the room?
A. Yes, in the inner room; Mr. Francis was there under arrest.
Q. He was in a different room?
A. He was just coming out.
Q. Did you see Mr. Francis doing anything?
A. He was under arrest when I reached the floor.
Q. When you saw him he was under arrest?
A. Yes, sir.
Q. You saw him doing nothing unlawful?
A. No, sir.
Q. Did you see Mr. Myers doing anything unlawful?
A. No, sir.
Q. Did you see Spencer doing anything unlawful?
A. No, sir.
Q. Mr. Bickel doing anything unlawful?
A. No, sir.
Q. When was the next time that you were in that room?
A. Never?
Q. Never after that?
A. No, sir.
Q. Have you any personal acquaintance with this man?
A. Very little.
Q. You never met him except on that occasion, did you?
A. Yes, sir.
Q. Speak to him?
A. Yes, sir.
Q. When?
A. Once when he was down to headquarters, or when he accompanied Officer Kinkead to see Col. Deitsch.
Q. When was that?
A. That was some months after this raid?
Q. How long after?
A. I don't recollect the date of that instance.

Q. Who was the officer with you then?

A. Officer Kinkead.

Q. You didn't see anything unlawful upon his person?

A. No, sir.

Q. Anything taken from him?

A. No, sir.

Q. Did you have any warrant for his arrest?

A. He was not arrested.

Q. Well, did you have any warrant to take him down to the chief of police's office?

A. He was not obliged to go other than he was requested to go and he agreed to go.

Q. Requested by you and the other officer to go and he went freely?

A. Not by myself; I had no such authority.

Q. Then you saw nothing unlawful at that time?

A. No, sir.

Q. Now, then, did you see him on any other occasion than that?

A. I have traced Mr. Francis a good deal on these trips to the Western Union Telegraph Office.

Q. That is, you have seen Mr. Francis go into the Western Union Telegraph Office?

A. With great regularity.

Q. With great regularity?

A. Yes, sir.

Q. There are a great many people that go in there with regularity isn't there?

A. I suppose so; I didn't notice them.

Q. Well, did you see what he did in the Western Union?

A. Yes, sir.

Q. What did he do?

A. He turned over a paper.

Q. He turned over a paper?

A. Yes, sir.

Q. Do you know what was in that paper?

A. No, sir.

Q. Did you ever see him turn over any paper?

A. Yes, sir.

Q. How often?

A. A good many times.

Q. Well, how often?

A. I kept a record of these observations.

Q. Where is that record?

A. I didn't count them up. In my books.

Q. When he came with you to headquarters did you search him?

A. No, sir.

Q. Did anybody else search him?

A. Yes, sir, Officer Kinkead searched him.

Q. At whose request was that?

A. That was at Col. Deitsch's direction.

Q. Was that on one of these trips that he was going down to the telegraph office?

A. Yes, sir.

Q. You arrested him then before he got to the telegraph office, or stopped him?

A. Officer Kinkead did.

Q. Did you witness the search of his person?

A. Yes, sir.

Q. Was it a thorough search?

A. No, sir, I regarded it as very superficial.

Q. Did you suggest anything to be done?

A. I think I did.

Q. Don't you know the gentlemen offered to be stripped entirely so that you might search?

A. Yes, sir.

Q. They didn't strip him, did they?

A. They didn't search him very much.

Q. You say that Mr. Price is one of your agents?

A. Yes, sir.

Q. Who is he employed by?

A. Myself.

Q. How much a day do you give him?

A. The pay was not definitely fixed, or either agreed upon or acted upon.

Q. Did you pay him any money?

A. Yes, sir.

Q. How much?

A. According to his services and according to the amount in the treasury.

Q. How much did you pay him, I asked?

A. It ranged from 50 cents to $2.

Q. Is that all you paid him?

A. Yes, sir.

Q. The sum total?

A. Yes, for his services.

Q. Did you promise him anything else?

A. No, sir.

Q. Did you promise to get him a situation?

A. No, sir. He was without a situation when I engaged him, and I all the time encouraged him to get a better position if he could.

Q. The service that he was to render was to endeavor to procure a play, was it, in one of the policy shops?

A. No, sir, that was part of his service.

Q. Who furnished him with the money to procure this play?

A. He served several months; he did very little in the policy compared with other services.

Q. Who gave him the money to make the play?

A. He received all his expenses from me. Whatever money he got.

Q. You say that some of these papers were printed over in Covington—these alleged drawings?

A. Yes, sir.

Q. Did you see one printed there?

A. No, sir, but repeatedly saw them brought from there.

Q. Did you ever see one printed there?

A. No, sir.

Q. Well, when was the last time that you saw one brought from there?

A. I don't think I seen the carrier bring them since Mr. Frazier was in the habit of bringing them.

Q. I asked you when was the last time?

A. I traced him over the Covington Bridge repeatedly.

Q. When was the last time you saw one brought from there. I asked you?

A. Last summer.

Q. What time last summer?

A. I don't recollect the date, but certainly—

Q. Then who was the man that brought them from there?

A. Mr. Frazier was one.

Q. Where is this place please?

A. Mr. Kyle's printing office.

Q. What is the name?

A. Kyle.

Q. Did you see Mr. Frazier when he went in?

A. Into the printing office?

Q. Yes.

A. No, sir, I only saw them brought over the bridge by him.

Q. You didn't see him when he came out did you?

A. No, sir.

Q. Well, then, how do you know that he got them in there?

A. I didn't say that he got them in there from my own personal observation.

Q. Didn't you a moment ago say that the last time was last summer, that you got one off of Frazier and that it came from the printing office of Mr. Kyle?

A. I said it was brought over the bridge then. I saw them brought over the bridge, that is all I can say from personal observation.

Q. When was the last one that you saw that was printed in Kyle's office?

A. This that he had on him when the officer took him. He himself said they were printed there, and had Kyle's cards.

Q. Is that the only way you know it?

A. Yes, sir.

Mr. Shay: I ask to have what Mr. Frazier said to him stricken out.

The Court: Who is Mr. Frazier?

Mr. Shay: I don't know him.

The Witness: He is the messenger.

The Court: Do you claim that he is a party to the conspiracy which is charged?

Mr. McPherson: All we know—we only claim this much, that he carried printed slips from this place to Mr. Reilley's place of business; that is part of the operation of this conspiracy.

The Court (to the stenographer): Make a minute of his answer then.

Q. It is a matter of fact, if I understand you correctly, Mr. Pelton, you don't know of your own knowledge that ever at any time any print of a drawing or alleged drawing of lottery or policy was made at the office of Mr. Kyle in Covington?

A. No, I don't know that of my own personal knowledge.

Q. Then the answers that you made this morning that Mr. Francis brought reports of alleged drawings to be telegraphed by the telegraph company, is a matter of surmise on your part?

A. Yes, sir; that must be proved by somebody else.

By Mr. McPherson:

Q. Describe this man Myers that you speak of—his personal appearance—that was in this room?

A. Henry Myers is a man of good, erect form, rather fleshy, very nice dresser, smooth face, a man in the neighborhood of 40.

Q. Did you ever see him with a mustache?

A. Well, perhaps so.

Q. What color would be his mustache if he wore one?

A. His hair was dark brown, inclined to be thin on top, his hair.

Q. Do you remember the color of his eyes.

A. Rather light than dark, I do not know the color.

Q. His place of business is where?

A. 113 E. Third street.

Q. What is his business other than the policy business?

A. I don't know.

Q. What other business does he pretend to have, if you know?

A. I am not aware that he has any.

Q. Mr. Shay asked you, if you seen any of the parties in Reilley's room at the time of the arrest, or raid, doing anything, to which you replied, not at that instant; please state what was the evidence you found there of doing anything?

Above question objected to.

A. We found a large amount of these policy books in the drawers on the first occasion, that plainly indicated headquarters—

Above answer objected to.

Q. Don't state your conclusions from any observations as to what things meant or appeared to mean—state what you saw?

A. On the second occasion we found a large amount of supplies and stationery for supplying various shops.

The Court: State what the stationery was—if it had printed matter upon it, what it was?

A. It was stationery of a yellow color, but thin, fine, strong paper, with carbonized sheets and strips of tin with which every policy shop is furnished from headquarters; I have often seen them carried by the carriers to these various shops and often captured them. By the use of the carbonized sheets they make two copies of these reports of individual bets, one of which is retained in the shop, one of which is sent—or two of which, I believe, are sent to headquarters. These supplies were there, a stack of them that high (indicating). A call came on this telephone while the officers were present and almost an instant Mr. Edgar jumped up and rang quite an alarm, I would call it, of the instrument.

Q. Did he go to the instrument?

A. Yes, sir.

Q. Did he speak through it or anything that way?

A. No, sir; I understood it as shutting off communication.

Q. Just state what you saw there—was anything else found there, attracting your attention to the official drawing?

Above question objected to.

A. No, sir; the official prints did not come to this place.
Q. When did you find the official prints there?
A. We did not find them in this headquarters.
Q. In Reilley's?
A. I found them in Reilley's shop but not in the headquarters room where the canvassing goes on. There is a slip there.
Q. What were upon those official prints to indicate the lottery they represented?
Above question objected to and sustained.
Q. What was on the official prints?
Above question objected to.
At this point the witness leaves the stand for a few moments.
As to the question whether or not Reilley was arrested and convicted, which was objected to in the foregoing testimony, the court sustains the objection.

By Mr. McPherson:

Q. I will ask you, Mr. Pelton, to state what chance or what is the percentage of the chances to win in this policy game?
The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court counsel for the defendants at the time excepted.
A. The numbers invariably being selected from 1 to 78, and 12 of them exposed on the official print, as the winning numbers in the forenoon, and 13 in the afternoon, and the endeavor of the patron to guess three or more of those numbers, you discover at once the element of chance.
Q. What is the percentage?
The Court: I think that will speak for itself when you have the fact as to how the lottery was conducted.
Witness is withdrawn at this point for a few moments.

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Lieut. Poppy, being called by the plaintiff and sworn, testifies as follows:

By Mr. McPherson:

Q. At the noon hour you were requested to make an effort to find the official prints that were taken from Reilley's place of business on the different raids made by the police department. Have you made an investigation of the police office?

A. I have, yes, sir.
Q. Are they to be found?
A. No, sir.
Q. What has become of them?
A. They have been destroyed.

Cross-examination:

By Mr. Shay:

Q. Who has charge of that department?
A. The clerk of the police department.
Q. You haven't any charge of it?
A. No, sir.
Q. You didn't destroy them?
A. No, sir.
Q. You didn't see them destroyed?
A. I did not.
Q. You didn't know only what they told you?
A. Only what the records show for it.

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Mr. Pelton resumes the stand and is further examined as follows:

By Mr. McPherson:

Q. You may state what was on those official prints?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court, counsel for the defendants at the time excepted.

Q. State, Mr. Pelton?

A. The official print of the Kentucky lottery, has, at the top 'K' & class number.

Q. Go on with your description.

A. 'K' with the serial number, then follows forenoon drawing, 12 numbers which come out irregular, for instance, 3-1-6-19, between 1 and 78, purporting to be a drawing immediately under these are the same figures exactly in numerical order, and it is with the use of the second series of these same figures that the bidder discovers whether he has won anything he compares his three numbers with that list.

Under this is 'H' with the serial number, which is different from the 'K' and a similar pair of rows of numbers, on the same principal; first irregular, then in numerical order.

Q. What does the 'H' mean?

A. We understand it is referring to the old Henry lottery of Kentucky. Beneath this is 'F' with the serial number and they exist in irregular order, 12 numbers in the forenoon and 13 in the afternoon, and regular numerical order of the same numbers beneath that.

Q. That 'F' stands for what?

A. Frankfort.

Q. These three lotteries are all conducted by the same people?

A. Yes, sir.

Q. You say you have an exact copy of one of those official drawings with you?

A. Yes, sir; I have a facsimile.

Q. These are copies of the official prints—

A. Of the Kentucky system.

The Court: This is a copy of a paper issued by whom?

A. The people who run the Kentucky H and F lottery.

McPherson: Which we claim is operated at 64 St. Paul Building.

To the introduction of said papers counsel for the defendants object; the court receives the papers in evidence for the purpose of illustrating what the witness means by an official print; to which ruling of the court in admitting said papers, counsel for the defendant at the time excepted.

Said papers are received in evidence and marked Exhibit No. 2 and Exhibit No. 3.

By Mr. Shay:

Q. You say that the Kentucky Lottery, the Henry Lottery and Frankfort Lottery are controlled by the same people?

A. I would not make so full a statement as that. All we know about it is K, H and F—

Q. Do you know of your own knowledge who controls those lotteries?

A. I know of a good number of parties that operate them.

Q. Well, did you ever see them in operation—did you ever talk with any of these people.

A. Yes, sir.

Q. Who?

A. Oh, I have talked with a good number of these policy lottery men.

Q. Name one of them?

A. I have talked with Mr. Reilley.

Q. Well, anybody else?

A. Yes, Hood Irwin.

Q. Were they operators of it or employes or what?
A. They have been operators of it to my knowledge.
Q. Did they tell you they were?
A. They admitted they were.
Q. They admitted they were to you?
A. Yes, sir.
Q. Now, the Kentucky lottery, did you ever see the owner of that?
A. I don't claim to know the owner.
Q. How?
A. I am talking about operators, not owners.
Q. You don't know anything about owners then?
A. I would not assume to—
Q. Do you know of your own knowledge that there is such a thing as a drawing?
A. We call this a drawing.
Q. Do you know of your own knowledge that there is such a thing as a drawing of numbers?
A. I know what is called a drawing.
Q. Did you ever see any drawing?
A. No, sir.
Q. Do you know of your own knowledge there is a drawing?
A. From the result, I think I do.
Q. Can you answer my question? Do you know of your own knowledge there is a drawing of this alleged lottery?
A. Referring to the system of—
Q. Do you know of your own knowledge whether or not there is a drawing of this alleged lottery?
A. I want to know what you mean by drawing.
Q. Mr. France described it this morning. Do you remember his testimony?
A. No, sir.
Q. There were 78 numbers put in the wheel, out of that 78 numbers there was 12 numbers drawn, in the morning 12, and in the afternoon 13; now, do you know of your own knowledge that there is any such a drawing as that takes place of these numbers?
A. I never saw one.
Q. You don't know whether there is or not, do you?
A. No, sir; not of that kind.

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Charles E. Page, being called by the government and sworn, testifies as follows:

By Mr. Bundy:

Q. Mr. Page, your name is Charles E. Page, I believe?

A. Yes, sir.

Q. Where do you reside?

A. I reside at Norwood.

Q. What is your business or occupation?

A. I am manager of the Western Union Telegraph Company at Cincinnati.

Q. How long have you held that position?

A. 17 years.

Q. Continuously?

A. Yes, sir.

Q. During the months of September and October and previous to that of '99 did you have any business with this defendant, John Francis, who sits to the left of his counsel, Mr. Shay?

A. I don't recognize Mr. Francis, I don't remember of ever seeing the gentleman before.

Q. Did you ever know him under the name of Prior?

A. I never knew him under any name; I never saw him, if that is the gentleman next to Mr. Shay; I never met him before to my knowledge.

Q. What, if any, messages did you ever carry or send through the office of the Western Union Telegraph Company from Cincinnati, with reference to the policy or lottery business?

The above question is objected to and sustained.

Q. I mean within the particular periods that I have mentioned, September and October, and a few months preceding that in '98?

Above question objected to.

Q. Mr. Page, have you any agreement or contract of any kind, as representing the Western Union Telegraph Company with any one claiming to be connected with the Kentucky Lottery?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court, counsel for the defendants at the time excepted.

A. We have no such agreement.

Q. Do you know of a firm that runs under the designation of William C. Francis, Jr. & Co.?

A. Only by hearsay.

Q. Does that firm do business with the Western Union Telegraph Company?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court, counsel for the defendants at the time excepted.

A. I think they do. It would probably be well for me

to state that as manager of the Cincinnati office, I never come in contact with customers in the filing of their messages. I never see them unless I go through the files for the purpose of finding out a matter of that kind.

Q. Do you know what the nature or character of the messages generally sent through the Western Union office of this city by W. C. Francis, Jr., & Co. may be?

A. Only by hearsay.

Mr. Shay: I object.

Q. What do you mean by hearsay?

A. I mean I have no actual knowledge myself by any arrangement I have with such a concern, or by actually receiving and handling their messages, or having anything to do with it.

Q. Have you ever seen any of their messages or have they been subject to your inspection?

A. I can not recall that any of them ever were.

Q. What knowledge have you with reference to the payment of their bills?

A. Well, I have no knowledge whatsoever; it don't come within my jurisdiction unless it is to authorize an account or something of that kind; that is attended to by subordinates in the office.

Q. Did you ever authorize an account to be kept with this firm?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court counsel for the defendants at the time excepted.

A. I never authorized an account with a firm such as you name to my knowledge. I don't think they have an account with our company.

Q. Through whose hands in a managing capacity do these telegrams pass and to whose inspection are they subjected?

A. Our telegrams are gathered in to our main office and 52 branches that we maintain in Cincinnati, a portion of them are brought in by messenger calls from call boxes that are in the houses of the customers; such messages are brought in by messenger boys and filed either at our main office counter with our receivers or else at our branch offices with our branch office operators. The receiver checks the messages, that is either paid or collect, as the case may be, puts on the time and they are sent up the tube to the operating department. From there they are distributed to the proper wire or table, transmitted and gathered up every half hour and go to the—what we call the examiner, who examines the messages to see that

they have been transmitted and places them in a case, they remain there until the next morning when they are taken to the bookkeeping department where they are sorted and packed and filed away. Unless it is necessary for any one of these messengers to be referred to me for any particular cause of investigation or inquiry, I never see them.

Q. How long are the original drafts of these messages kept in your office?

A. Under the rules of the company they are destroyed every six months, or as soon thereafter as the accounts have been properly audited.

Q. How many branch offices to which you have referred are in the vicinity of the St. Paul Building on Fourth street, between Main & Walnut, this city?

A. We have a branch at the southwest corner of Third and Walnut streets, we have one in the Gibson House office, in the Gibson Hotel—Gibson House, and one in the Dennison House.

Q. The original drafts of messages from all these branch offices are collected and delivered to the main office and go into the bookkeeping department for filing, do they not?

A. Yes, sir; daily.

Q. Who has charge of the bookkeeping department?

A. The chief bookkeeper.

Q. What is his name?

A. F. L. Hoff.

Q. And who is receiving clerk at the main office at about noon each day, and who held that place in October last year?

A. Well, we have three day receivers; I am not quite sure now which one is there at noon. They have their lunch hours; there is Mr. C. H. Woellner, H. Krombeck and Miss Madden.

Q. Do you know which one of these three receiving clerks is on duty about 5 o'clock each afternoon?

A. I think that Miss Madden is on duty at 5, and Mr. Crombeck. It is my recollection now that Mr. Crombeck goes off at 5 o'clock, and is relieved by Mr. W. F. McClure.

Q. Will you tell us, please, whether or not telegrams are often sent by business men and others in cipher?

A. Yes, it is a common practice.

Q. What is the rules to lottery and policy men in sending their dispatches?

A. Well, I can not say; I frankly don't know that I ever saw what you call a policy message in the world.

Q. Do you know whether or not they are in cipher?

A. I do not. I pay no attention, as I have stated before, to any messages that come over the counter or picked up.

Q. Do you know whether or not such messages are sent at all by the Western Union Telegraph Company?

A. Lottery messages?

Q. Yes, sir?

A. I think they are.

Q. Don't you know they are?

Above question objected to.

A. I think I did answer that. I have no personal knowledge of these messages at all. I don't ever remember of seeing one or handling any.

No cross-examination.

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Agnes Madden, being called by the government and sworn, testifies as follows:

By Mr. Bundy:

Q. Miss Madden, what are your full initials?

A. Agnes A.

Q. Where are you employed?

A. By the Western Union Telegraph Company.

Q. How long have you been employed there?

A. Since last August.

Q. What position do you hold?

A. Receiver.

Q. What are your duties as receiver?

A. To accept messages and check them and send them up stairs.

Q. During what hours are you on duty?

A. From 9 until 7.

Q. What time you get away for your noon lunch?

A. From 12 until 1.

Q. In what office are you employed?

A. In the manager's office.

Q. Where is that located?

A. On the ground floor, northwest corner of Fourth and Vine.

Q. In Cincinnati?

A. Yes, sir.

Q. Are you acquainted with, or do you recollect having seen this gentleman?

A. Yes, sir.

Q. In the telegraph office?

A. Yes, sir.

Q. About how often?

A. Well, sometimes twice a day, sometimes once. I don't think I have seen him there any more.

Q. Well, identify in this court room the gentleman that comes into the office of the Western Union Telegraph Company.

A. That gentleman over there.

Q. Sitting at the left of the counsel?

A. Yes, sir.

Q. When did you first notice him coming into the office?

A. Why, I don't know, I just noticed him coming in there the same as anybody comes in very often—I get to know them by sight.

Q. Well, as long ago as the last of September or October?

A. I could not say.

Q. How long after you became clerk in the office was it before you first began to notice him?

A. Well, I don't know, either.

Q. Does he still come in there?

Above question objected to and sustained.

Q. Well, can you relate a little more definitely, Miss Madden—try and refresh your recollection about what time with reference to the date that you were employed by the Western Union Telegraph Company you came to know this gentleman Francis by sight?

A. I don't think I could do that. I just got to know him by coming in there very often. I don't know when I got to know him by sight.

By the Court:

Q. When did you go there?

A. In August.

Q. How long after that?

A. Well, I don't know; I know him whenever I see him, that is all, but I know when I got to noticing him coming in.

Q. What hours of the day did he come into the office?

A. Why sometimes he comes in around 12 o'clock and sometimes in the evening.

Q. About what hour in the evening or afternoon?

A. About 5.

Q. What sort of messages did he leave?

A I never accepted any messages from him or I never saw him leave any.

Q. Who did accept messages from him?

A. I never saw anyone accept messages from him.

Q. What did he do with the messages that he brought there?

A. I never saw him bring any there.

Q. Who does he talk to when he goes in there?

A. I never saw him talk to anybody; he comes in there; I have never seen him speak to anybody.

Q. What does he do when he comes into the office of the Western Union Telegraph Company?

A. He walks in there sometimes and walks out, and sometimes he writes out on a blank.

Q. What does he write down on a blank?

A. I don't know; I have never seen him give it in there whatever he writes down.

Q. Did you ever see him speaking to Mr. Hoff?

A. No, sir.

Q. How long does he stay in the office when he comes there?

A. Sometimes only a few minutes, and sometimes about five.

Q. Now, isn't it a fact, that ever since you have been in that business he has been coming in, regular as you say, sometimes one a day, and sometimes twice a day, at hours of about 12 o'clock or about 5 o'clock, and that he leaves one or more messages to be sent through that office?

A. I have never seen him leave any messages and I never accepted any.

Q. I am not asking that question, Miss Madden.

A. Well—

Q. I am not asking—I understand the rules of the Western Union Telegraph Co., and I am not asking you to produce any telegrams, but I am asking you if it is not a fact that during about the hour of noon or at 5 o'clock, the defendant, this man Francis, comes into the Western Union Office and leaves a message to be sent over the wires—I am not asking whether you accepted it, or whether you know what is in it. Isn't that a fact?

Above question objected to.

A. No, I don't think it is a fact, because I am the only one there when he comes in around 12 o'clock to receive messages, and I never received any.

Q. What does he come in there for?

A. Well, I could not say, I don't know.

Q. When you say you have never received any, what do you mean by the word "receive"?

A. I mean he has never given me any messages to be sent.

Q. Well, has he given you any piece of paper at all?
A. No, sir.
Q. Does he ever speak to you?
A. No, sir.
Q. Does he ever speak to anybody else?
A. Well, I have seen him say, how do you do to some of the employes of the office, and I have never seen him say anything else.
Q. Who are some of the employes that he has been talking to?
A. He has spoken to the solicitor, Mr. Woellner.
Q. What was Woellner's duties?
A. Mr. Woellner is a solicitor.
Q. What are the duties of a solicitor?
A. Why, he solicits trade for the company.
Q. Anybody else you have seen him talking to?
A. No, I don't know that there is.
Q. Did you ever know him to send these telegrams or papers of any kind up stairs?
A. No, sir.

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H. T. Harrison, being called by the government, and sworn, testifies as follows:

By Mr. McPherson:

Q. Where do you reside, Mr. Harrison?
A. 741 Second Avenue, Dayton, Kentucky.
Q. What is your business?
A. I am at present employed as assistant to Mr. Pelton in this League Reform.
Q. How long have you been employed as assistant?
A. About 18 months.
Q. Do you know John Edgar?
A. Yes, sir; by sight.
Q. Do you know Anthony Hoff?
A. I know him when I see him.
Q. Do you know Charles W. Reilley?
A. Yes, sir.
Q. And do you know John Francis?
A. I know that John Francis; I always thought his name was Prior, but I know the gentleman to whom you allude.
Q. Does he go by that name in this city—by John Francis?
A. That is what I have always understood. I never spoke to the gentleman.
Q. Do you know what John Edgar does?

A. Yes, sir.

Q. What?

A. He is collector for a policy lottery.

Q. Did you ever follow him and watch him and know who he collects for, where he goes and what he does?

A. Yes, sir.

Q. When?

A. Well, on manifold occasions; I could not tell you on how many occasions.

Q. Prior to October, '99?

A. Yes, sir.

Q. Along about that time?

A. Yes, sir. At various times for more than a year last past—I have seen him different times.

Q. Where does he live, if you know?

A. Well, according to the best of my knowledge, he lives on Orchard Street, above 11th, in Newport.

Q. Kentucky?

A. Yes, sir.

Q. Where is Anthony Hoff's place of business?

A. Anthony Hoff occupies a barber shop on Saratoga Street, in Newport, between 5th and 6th.

Q. Does he do anything else but keep a barber shop?

A. I could not tell you what else he does; that is his ostensible business there. He receives policy plays once in a while, I suppose.

Q. What do you know about him receiving policy plays?

A. Well, I left one or two or three there with him.

Q. Do you mean you played policy there with him?

Above question objected to.

Q. You say you left one or two there with him; what do you mean, Mr. Harrison, by that?

A. I left one or two or three plays at Anthony Hoff's barber shop with him on the 2nd, 3rd and 4th of October.

Q. Of what year?

A. Last year.

Q. Second, third and fourth. Now, did you watch or observe anyone come to his house on the second?

A. Yes, sir. I noticed that Mr. Edgar, John Edgar, came there regular a week or so prior to that; that was the reason I left the plays there.

Q. You noticed that he came there?

A. Yes, sir.

Q. Where would John Edgar go after he would go there?

A. Go across the bridge, over into Cincinnati.

Q. Did you follow him over at any time?

A. Yes, sir.

Q. Where would he go when he would go to Cincinnati?

A. Well—

Q. I want you to describe his route, wherever he went particularly—where he went when he came there.

A. He went finally—

Q. Not finally—where did he go first after he came across the river?

A. The first time his general route was to go to Third and John streets, where he remained for—

Q. What did he do at Third and John?

A. On one occasion I noticed that he collected lottery plays there on the side walk and in the house.

Q. Who of?

A. Different parties—negroes and people.

Q. Where did he go from there?

A. Well, when he left there I have noticed that he goes to Rapoles' and from there to Reilley's.

Q. Who is Rapoles?

A. He keeps a policy shop in a saloon on Pearl street.

Q. Pearl street where?

A. This city.

Q. The city of Cincinnati?

A. Yes, sir.

Q. From Rapoles' he would go where?

A. Reilley's.

Q. What time would he reach Reilley's?

A. At about 11:40 and 4:40, with the exception of a variation of about 5 or 6 minutes—that is the time to get to Reilley's.

Q. Would he make that trip regularly, twice a day?

A. Yes, sir. Take the morning trip he would get there about 11:40.

Q. He would get there about 11:40, what would he do then?

A. Well, he would remain there?

Q. How long would he remain at Reilley's?

A. He would remain—well, as a usual thing, he would remain there until 1 o'clock sometimes.

At this point court adjourned till Tuesday morning, 9 o'c.

E. W. Everett, being called by the government and sworn, testifies as follows:

By Mr. McPherson:

Q. What is your business, Mr. Everett?
A. I am a collector.
Q. Collector for whom?
A. Thomas Emery & Sons.
Q. Do you collect for the St. Paul Building?
A. Yes, sir.
Q. I will ask you in whose name Room 64, in the St. Paul Building, is rented?
A. W. C. Francis, Jr. & Co.
Q. Did you ever receive the rent from anyone who occupied that room?
A. I did.
Q. I wish you would state if that is the gentleman that you received the rent from?
Above question objected to.
Q. Well, do you know his name—do you know the name of the gentleman who paid you?
A. I always supposed it was Francis.
Q. Was this the man—the gentleman that paid you?
A. No, sir.
Q. Did he ever pay you?
A. Not to my knowledge.
Q. Describe the gentleman that paid you?
The above question is objected to by counsel for the defendants, the court overruled the objection, to which ruling of the court counsel for the defendants at the time excepted.
A. Oh, he was about 5 feet 11, pretty good build, black mustache; he seemed to be an athletic sort of fellow, as near as I can describe him.
Q. How many times did he ever pay you?
A. Can I look at some papers?
Q. Yes, to refresh your memory. I do not care for you to be accurate, just approximate, Mr. Everett?
A. I took it about 8 times last year, and I collected it once so far as this year.
Q. Did the same man pay it each time?
A. He paid up until February second, when some other man paid it.
Q. Of this year?
A. Yes, sir.
Q. Do you know the name of the gentleman that paid it to you?
A. No, sir, I do not.

Q. How was it paid by check or the money?

A. By money always.

Q. Did you ever see that gentleman in Room 64?

A. No, sir.

Counsel for the defendants moved the court to rule out the testimony of the above witness.

The Court: I am unable to say what testimony will follow to make this relevant, and the motion at this point will be overruled.

Counsel for the defendants except to the above ruling of the court.

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H. T. Harrison resumes the stand and is further examined as follows:

By Mr. McPherson:

Q. You were proceeding to describe your observation as to what Mr. Edgar did, going and coming from Covington to Mr. Reilley's; you have described how you traced him to Mr. Reilley's in the forenoon. The last question was, how long did he remain at Reilley's. State if you know where, if any place he went, when he left Mr. Reilley's from this forenoon arrival.

A. Invariably on Sixth Street to the west as far as Elm—Plum Street, into Holcomb's policy shop.

Q. Go on.

A. From thence he was generally accompanied by Star—James Star.

The Court: Of whom are you speaking?

A. Edgar.

By Mr. McPherson:

Q. Who is Jim Star?

A. Well, he is another policy gatherer for headquarters.

Q. Proceed.

A. I don't know, you might term it runners or agents, I don't know; then from there they would go to the Gold Bar on Central Avenue and Longworth in the basement.

Q. What kind of place is that?

A. Well, that is a policy shop according—I went to my own knowledge, I won't say that is a policy shop, but it is reputed to be such.

Q. Well, from there where would he go?

A. They were simply distributing prints to the different various places, and I did not follow Mr. Edgar any further than that.

Q. What kind of prints?

A. Prints of the official returns of each drawing, printed on a slip of paper with the numbers on so that the winners may see or players may see whether they won or lost.

Q. Well, that is in the morning; when did you next see Mr. Reilley again that day, if at all?

A. Mr. Reilley?

Q. Mr. Edgar?

A. Which day?

Q. The same day.

A. Well, which day do you allude to?

Q. We are speaking now of your observation of Mr. Edgar for a long time prior—

A. My former answer alluded to the general business and particularly at the time of this arrest.

The Court: In speaking of his movements, are you speaking of the same occasion now, at or about the time of the arrest?

A. Yes, sir.

Q. Or some other time?

A. I am speaking of the general movement of Mr. Edgar and the general business of the agents, but particularly in regard to these from the first to the sixth of October.

Q. Please state, what if anything, was done by you at Mr. Hoff's place of business upon the second, third and fourth of October, '99?

A. Well, I went in to get a shave there and I left a play in policy with Mr. Hoff, to be sent across the river, I went across the river—

The Court: Turn to the jury and lift your voice, so that every man on the jury can hear you.

A. It was on the 2nd of October; Mr. Hoff received my play in the usual manner of policy men.

Upon motion of counsel for the defendants, the court strikes out what the witness said about "the usual manner of policy men."

Q. On the second day of October, take that day?

A. Well, he received my play and I was shaved there and that was about all that was done.

Q. What was done?

A. Well, that was done, and I left the place.

The Court: Describe what you did and what he did?

A. I made out a ticket in duplicate, containing so many numbers with the amount of money that I chose to put on each ticket; I left one of them with Mr. Hoff and retained the other, and after leaving that with Mr. Hoff I left the barber shop and watched the place until Mr.

Edgar came there and left, then I followed him across the river, passing over the Central bridge and along Second Street.

Q. Second street where?

A. To Third and John and Central avenue, in Cincinnati.

Q. What did he do then, if anything?

A. Well, there had been a fire there about that time—no the time—I am alluding to the time before, there had been a fire though and the men were at work there and there was a good many people there and I remained at Third and John, I suppose in the neighborhood of an hour, nearly an hour or about an hour; Mr. Edgar was frequently on the sidewalk during that time and many times in and out of the saloon, the same as upstairs from an outside stairway that runs up to the second story; he saw a great many people there and evidently—I won't say he received anything—he received things from them, I won't say they were policy plays.

Q. Go on?

A. He remained there until about 11 o'clock or nearly so, and from there he went to Rapoles and from there to Mr. Reilley's headquarters, to the policy shop on Sixth street.

Q. Who is Rapoles?

A. Rapoles is a man that keeps a saloon, and there is one Rapole, Phil, the young one, I think he writes policy there; I know I have seen evidence of it enough to convince me that—

Above answer objected to.

Q. About what time in the day on the second day of October did Mr. Edgar reach Reilley's place of business on Sixth street?

A. Well, he reached there at about 11-37 or 40—11-37, I think, on the 2nd, was my time on him there.

Q. How long, if you know, did he remain there?

A. Well, I could not say positively; in the neighborhood of one o'clock, it might vary five minutes.

Q. Where did he go when he left there on the 2d day of Oct., '99?

A. Well, I before answered that question. He went with Star west on Sixth street as far as Plum and down to Longworth and Central Avenue, where I left him.

Q. When, if at any time, did you receive word whether the play you made was successful or not?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court, counsel for the defendants at the time excepted.

A. I received word from Mr. Hoff the next day.

Q. Go on?

A. That was the answer.

Q. Well, word was received by Mr. Hoff—from Mr. Hoff—

A. He exhibited the prints.

Q. What prints?

A. Said to have been received from headquarters.

Q. What prints?

A. The official drawings—the numbers printed on a small piece of paper about that long (indicating), which we understand to be the prints of the official drawing of winning numbers the drawn numbers, in fact.

Q. Did you say that you preserved a copy of the numbers played that Tuesday?

A. Yes, sir.

Q. Where is that?

A. No, sir; I didn't preserve a copy; I preserved the numbers but not the original copy.

Q. What has become of that paper upon which the numbers were preserved?

A. I have it.

Q. Can you produce it?

A. Yes, sir.

By Mr. Shay: When did you make that?

A. The second of October.

Q. Upon the same day—at the same time?

A. This is the second day—of October, that I have been testifying about all the time.

The Court: Is this the one you made at Hoff's?

A. Yes, sir.

Q. The one you retained?

A. Yes, sir; no, this is not what I retained as a copy of the play, your honor; this a memorandum from it; I have not the original copy.

Q. I understand that you made it out in duplicate?

A. Yes, sir.

Q. And gave Hoff one and you retained one?

A. Yes, sir.

Q. This is not the one you retained?

A. When you lose you generally tear it up and throw it away, but I preserved these numbers, because I played these numbers the second time on the succeeding day, some of them.

Q. When did you make that memorandum, Mr. Harrison?

A. On that day.

Q. Please give to the jury the numbers that you played upon that day?

Counsel for the defendants object to the witness reading from the memorandum, the court holds that the witness may use the memorandum to refresh his recollection; to which ruling of the court, counsel for the defendants at the time excepted.

Q. Just answer the question. Give the numbers that you played upon the second day of October, if you can refresh your recollection from that memorandum?

A. Well, I will read them off if you have no objection.

Q. Mr. Harrison, you answer my question and make no other remark.

The Court: Mr. Harrison, we will make much better progress if you give close attention to the questions and answer them fully and responsively. Do not go beyond what the question calls for.

Q. Now, you may look at that paper and refresh your recollection, then tell the jury, if you can, what numbers you played that day?

A. In K, 11, 23, 35, 47, 10 cents; 9, 21, 33, 45, 10 cents in H. Now, your honor, there are three numbers here that I won't—

Q. You need not go into that?

A. There were three numbers that I played at the same time that I can not answer according to the instructions from the court, because I attempted to play it—and to tell the truth, because I attempted to play it in one book and he would not take it, and I had to put it in the other, I have got to make that explanation. Those numbers were 13-25-37, finally in F, 5 cents.

Q. You say at the end, giving figures each time, 10 cents in K, 10 in H, and 5 cents in F, what do you mean by that?

A. I mean in the Kentucky lottery; it is 10 cents for the Kentucky, 10 cents for the Henry and 10 cents for the Frankfort, or 5 cents for the Frankfort.

Q. What do you mean by, it is 10 cents?

A. That I risked 10 cents on the chance of winning so much money, if I guessed the numbers.

Q. You speak of five cents in F?

A. Well, 5 cents is a flat gig.

The Court: What do you mean by flat gig?

A. They pay 200 for one; for 5 cents, I would get, of course, $10 if I won.

The Court: Have him explain at that point so the jury may understand what is meant by flat gig?

A. Well, a gig is any three numbers that has been chosen by the player, that comes out in the official print.

Q. What is the difference between a gig and a flat gig?

A. You generally call a flat gig if you play just three numbers, and those three numbers happen to come out in the 12 drawn numbers, then it is one single gig or flat gig, but if you play 4 or 5 numbers there is more than one gig; in three numbers is a gig, four numbers are four gigs, five numbers is ten gigs.

The Court: That is you mean, that you can make combinations of three—four combinations of three, out of four numbers?

A. Yes, sir.

By Mr. McPherson: State who made out this ticket, if you know, on the second of October?

A. I made it out.

Q. What did you do with it when made out, if anything?

A. Well, I gave one-half of it to Mr. Hoff and I kept the other half.

Q. Did you give him anything else besides the ticket?

A. The money.

Q. Now, you may state what you did upon the Third of October?

A. On the third of October I played the same four-rowed numbers and omitted the flat gig.

Q. What time in the morning upon the third did you play it?

Mr. Shay: That all goes in under exception, as the indictment is laid on the 5th—the specific act.

Q. What time in the morning was the play made, Mr. Harrison?

A. On the third, I played after Mr. Edgar left, the numbers that I have before stated.

Q. What do you mean by "after Mr. Edgar left"?

A. I mean he left in the morning before 10 o'clock and I played somewhere between 11 and 12.

Q. For what drawing did you play that day?

A. I played for the same drawing that I did on the previous day, and the same numbers with the exception of the three numbered flat gig, which was omitted.

Q. Did you observe anything about, or do you know what became of these numbers played?

A. Well, they were taken across as the others were.

Q. By whom?

A. By Mr. Edgar.

Q. When?

A. In the evening.

Q. State what you observed in reference to Mr. Edgar's taking those across?

A. Well, Mr. Edgar left Mr. Hoff's about 10 minutes before two.

Q. Speak so the jury can hear you. Where did he go?

A. He went over above the same route to Third and John.

Q. Did you watch him?

A. Yes, sir.

Q. Where did he go from Third and John?

A. Well, he remained at Third and John until nearly 4 o'clock.

Q. Where did he go from there?

A. He went to Rapoles.

Q. Then from there where?

A. Reilley's.

Q. Did you watch him until he arrived at Reilley's?

A. Yes, sir.

Q. How long did he stay there?

A. He stayed there until about 6 o'clock.

Q. Where, if any place, did he go, after he left Reilley's?

A. I didn't follow him further than the Palace Hotel.

Q. Now, upon the morning of the fourth you say you played there?

A. Yes, sir.

Q. What numbers did you play that morning?

Mr. Shay: The same objection and exception.

A. I have not got a copy of them and I don't remember. I gave the copy away.

Q. You may describe your play that morning of the fourth, Mr. Harrison?

The Court: Ask him what he did and what Hoff did.

Q. What did you do and what did Mr. Hoff do upon the morning of the fourth?

A. Well, I left a play with Mr. Hoff.

The Court: Tell what you did. Don't give any conclusion.

A. Well, I played with Mr. Hoff. I made a duplicate play with Mr. Hoff on the morning of the fourth. I retained one-half and left the other with him.

Q. What do you mean when you say you made a duplicate play?

A. I made a duplicate ticket; I left one-half with Mr. Hoff and I retained the other.

Q. Explain what you mean by ticket?

A. The numbers that I think proper to play, that I choose to play, and in which lottery or policy game, I choose my numbers and put them down; when I have got my ticket made, I make a duplicate of it, and tear that in two and make two tickets and I hand the man one and keep the other.

Q. Upon that morning when you handed Mr. Hoff the play, what else, if anything, did you hand him?

A. The money.

Q. How much money?

A. Well, I don't remember because I have not got the paper.

Q. Upon what kind of paper did you make that play and the duplicate?

A. I made it on the back of an envelope.

Q. Would you recognize the duplicate or part that you kept if you would see it?

A. Yes, sir.

Q. I will show you a paper and ask you if that is it? I will ask you if that is the copy or part of the play that you retained on the morning of the fourth?

The above question is objected to by counsel for the defendants, the court overrules the objection to which ruling of the court, counsel for the defendants at the time excepted.

A. I recognize that as my handwriting and a copy of the play that I made on the morning of the fourth of October last year.

Said paper offered and read in evidence and marked Exhibit "No. 5."

Counsel for the defendants reserve exceptions to the offering and receiving of said Exhibit in evidence.

Q. Now, you may state how much money you handed to Mr. Hoff at the time you handed him the duplicate, or the other half of this envelope, upon which these same numbers were written?

A. 20 cents.

Q. What, if anything, occurred, after this play was made, by you, as you have described it?

A. Well, I left Mr. Hoff's immediately and came over the Central bridge to Cincinnati. I met two officers of the police force at the end of the bridge, corner of Second and Broadway.

Q. Who were these officers?

A. I don't know, sir, uniformed officers—I asked them—

Above question objected.

Q. Don't repeat any conversation with them. You may tell what you did.

A. Well, I identified Edgar as he came over the bridge.

Q. From where?

A. From Newport—and they arrested him.

Q. Where was he arrested at?

A. Arrested at the end of the bridge, this side, in Cincinnati.

Q. Where was he taken, if you know?

A. Taken to Hammond street station.

Q. What, if anything, was done with Edgar, when he was taken into the station—were you in there?

A. No, sir.

Q. Who, if anyone, was with you on the morning of the fourth, when this play was made, Mr. Harrison?

A. Mr. Price.

Q. What is Mr. Price's first name?

A. I think it is J. M.

Q. Where does he live?

A. J. M. or J. W., I won't be certain. He lives at 614 York Street, Newport.

Q. When you left Hoff's on the morning of the fourth, after you had made this play, where did Mr. Price go, and what did he do, if you know?

A. I never saw Mr. Price until he came to me at the time of the arrest.

Q. Where did you leave him?

A. I left him at Mr. Hoff's.

Q. And you saw him the next time when?

A. When the officers arrested Mr. Edgar.

Q. I will now ask you if you can identify or state what that paper is I hand you?

A. That is a policy play that I made with Mr. Hoff on the morning of the fourth day of October last. There has been some initials there that I do not recognize.

The Court: Which paper is it, the one that you retained or the one that he retained?

A. The one that he retained.

Said paper is offered and read in evidence, marked "Exhibit No. 6." To the offering and receiving which in evidence counsel for the defendants objected, and the court overruled the objection, to which ruling of the court counsel for the defendants at the time excepted.

Q. You may state upon what piece of paper you made this play upon the morning of the fourth?

A. I made it on one part of an envelope—on the address part of an envelope—printed envelope.

Q. How did you make it upon that printed envelope?

A. I wrote it in lead pencil.

Q. How?

A. I wrote it in duplicate and tore the envelope in two and gave Mr. Hoff one-half and retained the other.

Q. Is that the envelope which you made that play upon and which you tore in two and handed one-half to Mr. Hoff and retained the other half?

A. Yes, sir. This is the interest in the lottery and that is the evidence of it.

The Court: I do not understand you. Speak louder.

A. This is the retained copy as evidence of the play; this is the paper that I left with Mr. Hoff, being my chance of drawing or interest in the drawing if I won.

By a Juror:

Q. Which is the original and which the duplicate—I don't understand that.

A. No. 5 is the duplicate and No. 6 as I understand the stenographer is the original. This first exhibit is the evidence of the play; the second exhibit is the interest that I had in the lottery that was to be drawn that morning.

The Court:

Q. Mr. Harrison, so that the jury may understand this matter—give him those two pieces of paper—if I understand you, you made out what you call your play in duplicate, upon one piece of paper?

A. Yes, sir.

Q. A piece of an envelope?

A. Yes, sir.

Q. You tore it in two?

A. Yes, sir.

Q. Handed one piece to Hoff and kept the other?

A. Yes, sir.

Q. Are these the papers?

A. These are the papers.

Said papers were heretofore offered in evidence.

Cross-Examination.

By Mr. Shay:

Q. Where do you live, Mr. Harrison?

A. 941 Second Avenue, Dayton, Kentucky.

Q. How long have you lived there?

A. About 2 years.

Q. Are you married?

A. Yes, sir.

Q. What business are you engaged in?

A. I am in the employ of the Executive Committee of the Municipal League Reform, as Assistant to Mr. Pelton.

Q. What wages do you get?

A. Well, I get regular wages.

Q. What is it?

A. Well, unless the court compels me to answer—

The Court: Answer.

A. I get about—it is rather hard to tell; sometimes I

get more than others. Average about $10 a week I guess.

Q. For how long have you been engaged, getting $10 a week on an average?

A. Well, since the 8th day of November, '98.

Q. What is it that enables you at sometimes to get more than others?

A. By reason of expenses, and by reason of extra work sometimes, longer hours.

Q. Who employs you?

A. Mr. Pelton and sometimes Mr. Richie, but at least, Mr. Pelton, as a usual rule I look to.

Q. Are you acquainted with Mr. Edgar?

A. Only as a business proposition.

Q. You never had any speaking acquaintance with him?

A. No, sir.

Q. You never have had any talk with him?

A. No sir—Oh, excuse me, I believe there was a word or two passed between us since the arrest.

Q. But before that you never had?

A. No, sir; no, sir.

Q. You were not present when he was employed by anybody?

A. When he was employed?

Q. Yes, sir?

A. Who, Mr. Edgar?

Q. Yes.

A. No, sir.

Q. Then the matter of him being employed by the lottery people is a matter of surmise upon your part, from your observation, is that it?

A. Yes; a matter of general understanding.

Q. A matter of general understanding between you and Pelton?

A. No, sir.

Q. Who else?

A. Observation and reports of others and knowledge of policy men generally.

Q. Now then, you say that you saw Edgar on the morning of the second of October last?

A. Yes, sir.

Q. At Mr. Hoff's place?

A. Yes, sir.

Q. How long have you known Mr. Hoff?

A. Had I known Mr. Hoff?

Q. Yes?

A. I hadn't known Mr. Hoff at all hardly; I should suppose that I was led to go there, by following Edgar there.

Q. Had you known Mr. Hoff at all?
A. No, sir; about a week or two before that.
Q. What was his business?
A. Mr. Hoff's?
Q. Yes.
A. Barber.
Q. Do you go there to get shaved?
A. Yes, sir; as an excuse.
Q. How?
A. As an excuse only.
Q. You didn't want to get shaved as a matter of fact?
A. Yes, I did want to get shaved.
Q. In addition to that you wanted an excuse for entering this place?
A. Yes, sir.
Q. Did you sit down in his shop?
A. Yes, sir.
Q. How long did you remain in his shop?
A. On what occasion?
Q. Well, on any of these occasions, say for a week before this morning?
A. Oh, long enough to get shaved and make the play.
Q. You say make a play?
A. Make my ticket out, give it to him and give him the money.
Q. You say make your ticket?
A. Yes, sir.
Q. That was your individual property, was it?
A. Yes, sir.
Q. These tickets that you made were the evidence of the numbers that you had selected to win your bet, in the event that they came out in the drawing, were they?
A. The one I kept was the evidence of what I expected to win, and the one I gave him was the interest supposed to be in this lottery, as I understand it.
Q. That was the thing that you had written out, to determine, if those numbers came out, what you were going to win on those numbers?
A. Yes, sir; I could save the other half as evidence that I was entitled to it.
Q. I won't argue the question?
A. Well, I was answering the question.
Q. On that morning of the second of October, what time did you go there?
A. On the 7th of October?
Q. The second?
A. Well, I got there on the second of October about—it was scarcely 9 o'clock.

Q. How long did you remain there?
A. I don't think 5 minutes.
Q. Did you get shaved that morning?
A. No, sir.
Q. Did anybody go with you?
A. Yes, sir.
Q. Who?
A. Mr. Price.
Q. Where was Mr. Pelton?
A. I don't know, sir.
Q. Where did you go then?
A. I waited on the outside in veiw of Mr. Hoff's.
Q. Whereabouts did you wait?
A. I was down at the corner of Fifth street and Saratoga.
Q. How far was that away from Hoff's place?
A. A half block.
Q. Did anybody go into Mr. Hoff's place?
A. Mr. Edgar.
Q. Was that the only man that went in?
A. The only one that I remember, sir.
Q. How long did you stay there watching?
A. Perhaps 40 minutes.
Q. Perhaps 40 minutes?
A. About.
Q. During that 40 minutes you say there was not a soul entered that shop except Edgar and yourself?
A. I don't think so.
Q. When did you come back?
A. When did I come back?
Q. Yes?
A. To where?
Q. To Hoff's place?
A. The next day.
Q. What time the next day?
A. About 11 o'clock.
Q. What did you do then?
A. I made a play as before stated.
Q. What did you say?
A. What did I say?
Q. What did you say to Mr. Hoff?
A. I don't understand that remark.
Q. What did you say to Mr. Hoff?
A. Oh, I demanded, of course—I didn't demand, I requested to see the drawings which were shown to me on the previous day; I looked over them, saw I didn't win, and replaced it.
Q. I didn't ask you for that. I asked you what did you say to Mr. Hoff?

Mr. McPherson: That is what he is answering.

Q. I am asking what he said?

A. I don't remember that I said anything more than that.

Q. At the time then, did you make a play that morning?

A. I left a play; yes, sir; after I looked over the other play, I left the same play.

Q. What did you say when you made that play?

A. I said that I would not play the flat gig, and I tried to play it in the C. P., and he would not have it—and they would not take it, and I played it—and I omitted a play and come on the second day: the first day I put it in the Frankfort.

Q. You omitted to play?

A. On the second day; yes, sir.

Q. Didn't you swear to the jury on the morning of the third that you made a play, also you made a play in the afternoon?

A. No, sir.

Q. When did you make your next play then?

A. Next to what?

Q. Next play?

A. Next to the third; on the fourth.

Q. How long did you remain there on that day, the third?

A. On the day of the third?

Q. Yes?

A. About five minutes.

Q. And where did you go then?

A. I went in the vicinity of the shop to see who went in and out of Mr. Hoff's.

Q. Well, did you see anybody go in or out?

A. I saw Mr. Edgar.

Q. Anybody else?

A. No; I don't know that I did.

Q. How long did you remain watching?

A. The second day?

Q. Yes, sir?

The Court: What do you mean by the second day, the 3rd of October?

A. Yes, sir; I don't remember of anybody else going in there.

Q. Well, how long did you remain watching?

A. Until Edgar came out.

Q. How long was that?

A. I had no time there; I suppose it was about, as near as my judgment would let me guess it, would be about 9-45, or 9-40 or 45.

Q. Do you mean that on the morning of the third?

A. No; I mean that on the morning of the fourth.

Q. I am asking you about the third—how long did you stay there?

A. The morning of the third, I played after Mr. Edgar left; I didn't see him leave.

Q. Didn't you say a few moments ago that on the morning of the third you omitted to play at all?

A. No, sir; I omitted to play flat gig.

Q. You didn't say that a few moments ago?

A. Well, I have said it all along and I say it now.

Q. What time did you go there on the morning of the third?

A. On the morning of the third, I didn't get there until about 11 o'clock.

Q. How long did you remain in the shop?

A. About 5 minutes.

Q. Was anybody else in the shop?

A. No, sir; except Mr. Price.

Q. Where did you go?

A. Except Mr. Price.

Q. Where did you go after leaving the shop?

A. Leaving the shop?

Q. Yes, sir?

A. Well, I went on about my business, the second day, we watched Mr. Edgar.

Q. Call it the third so we won't get into confusion; on the third of October, where did you go?

A. On the third of October, I left a play for Mr. Hoff, but Mr. Edgar didn't take it over in the morning, because I was there too late.

Q. Didn't you swear a moment ago that you didn't leave any play until after Edgar had gone, and then you went in to make a play?

A. Yes, sir; I say so; yes, sir.

Q. Now then, how long did you remain outside of the shop?

A. On the third day?

Q. Yes?

A. Well, I didn't remain outside of the shop to watch for him, because I knew he had gone.

Q. Because you knew he had gone?

A. Yes, sir. The first I watched for him the second day of the month—

The Court: Confine yourself to the questions.

Q. What do you mean by you knew he had gone?

A. Because for two weeks previous to that I had watched his movements, until I found his business and I knew his time.

Q. Until you thought you found his business, is that it?

A. Exactly; I accept the amendment.

Q. You left a play and went away?

A. Yes, sir.

Q. You didn't swear in your examination awhile ago, in your statement to the District Attorney in your examination in chief and in your statement to me, in your cross-examination, that you remained in the shop about 5 minutes, after looking at the drawing and went down and remained upon the corner where you could watch to see if Edgar went in?

A. That was the first day, the second of the month.

Q. You didn't do that on the morning of the third?

A. No, sir; not on the morning of the third.

Q. Where did you go then after you left the shop?

A. I went about my business; I had other business that had nothing to do with this.

Q. Whereabouts did you go?

A. That day?

Q. That morning after leaving the shop?

A. I came over to Cincinnati; I had other business not connected with this matter.

Q. Did you say anything to Mr. Hoff on that morning?

A. Well, I came in and he produced the paper; there was not anything of importance said that impressed itself upon my mind, more than I told him that I would omit the flat gig that I would play the same numbers back again but omit the flat gig from the day before.

Q. Is that all that was said?

A. That is about all.

Q. Did you retain any ticket that morning?

A. Why, of course, I retained a duplicate.

Q. You retained a duplicate—you haven't got that?

A. No; I kept the numbers, that is all, the same numbers as the first day.

Q. You said that when you found that you had lost, you tore up the paper that you made the memorandum on, is that so?

A. We generally tear it up when we lose.

Q. Did you do that that day?

A. Yes; I think so.

Q. Where did you get this other memorandum that you got—when did you make that?

A. I made it in my book that I usually carry for notes and dates and retained it because I thought I would be asked for these numbers.

Q. When had you made that?

A. I made it at the time that I had those numbers from Mr. Hoff's shop; I suppose it was on the third; I suppose I made it in my book on the third of October.

Q. When did you get this memorandum from your book that you testified from this morning?

A. That was a leaf of my book and I tore it out.

Q. When did you make it, I asked you?

A. I made it—

The Court: Just answer the question.

A. The third of October.

Q. On the morning of the fourth—did you go back on the afternoon of the third of October?

A. Yes, sir.

Q. What time?

A. I was at Mr. Hoff's at about a quarter of 2—1-45.

Q. How long did you remain there?

A. I remained until Mr. Edgar came.

Q. Well, what time did he come?

A. He came about 15 minutes of 2.

Q. You and he there at the same time?

A. Yes, sir.

Q. Who left first, you or him?

A. Oh, not at the office—no; I didn't go in his shop, I went to the vicinity of the shop.

Q. How close to the shop?

A. Within a half block.

Q. You didn't go in the shop in the afternoon then?

A. Oh, no.

Q. You say within a half block?

A. Yes, sir.

Q. Well, how long did the man Edgar remain in there?

A. I think he remained there on the third about—well, 10 minutes about.

Q. Did you see anybody else go in there?

A. I did not.

Q. Did you see anybody else come out?

A. Nobody.

Q. During all the time that you were there?

A. Nobody that I remember.

Q. Did you see Mr. Hoff give him anything?

A. No; I didn't go up there to see Mr. Hoff.

Q. At any time did you ever see Mr. Hoff give him anything?

A. Yes, sir.

Q. When?

A. About a week previous to the time I played there.

Q. About a week previous to the time you played there?

A. Yes, sir.

Q. But at any time that you played there, did you ever see him give him anything?

A. After I played there I never went back there.

Q. Well, answer my question now, please. Did you ever see him give him anything after you played?

A. No, sir.

Q. On the morning of the fourth how long did you remain?

A. No longer than it required me to make the play—about five minutes.

Q. Then where did you go?

A. I went immediately across the bridge.

Q. What time in the morning was that?

A. My remembrance is 9-30.

Q. What did you say to him on the morning that you made the play?

A. I said I lost twice, this is the third time, it is the charm.

Q. What else?

A. That is all I remember.

Q. Did you say nothing more to him?

A. I don't remember that I did.

Q. That is your best recollection of what you said to him?

A. Oh, yes, that is about the best that I can remember. If you would suggest anything—

Q. Then you immediately left?

A. Yes, sir.

Q. And went across the bridge?

A. Yes, sir.

Q. Did you go back any time that day?

A. No, sir.

Q. How soon thereafter was the man arrested?

A. About 10 o'clock, I could not tell it exactly; I had no time, but I suppose about 10 o'clock.

Q. You said there were headquarters up on Sixth Street up over Reilley's; were you ever up there?

A. No, sir.

Q. Then all you know about it being headquarters is what somebody has told you?

A. No, that is not true.

Q. Well, how do you know it is headquarters, from your observation?

A. Yes, sir.

Q. Is that all?

A. Well, do you desire me to tell all about how I know it is headquarters?

Q. I am asking you, is there any other means that you have except observation?

A. By continued observation of the various policy players, whom I knew to be policy players and policy writers and agents that went and come to Reilley's and my being in Reilley's myself previously.

Q. Thereupon you concluded that must be headquarters, is that it?

A. I saw them arrested and brought out of there twice.

Q. That is the way you form your opinion?

A. Well, from general report of policy people, together with my observations, that is the way I make up my mind.

Q. It is made up entirely from that?

A. That is all, sir; that is the way.

Q. What business were you in before you became employed by Mr. Pelton?

A. I was a mechanical engineer.

Q. Where?

A. Cincinnati and vicinity.

Q. Where was the last place you worked?

A. The last place I worked was at the Cincinnati Veneer Co.

Q. How long ago?

A. Oh, I guess it has been—well, it was last summer.

Q. How?

A. Last summer.

Q. Last summer?

A. Yes, sir.

Q. I thought you had been earning $10 a week since '98?

A. Sir?

Q. I thought you had been earning $10 a week since '98 from the Reform League?

A. I told you it amounted to about that.

Q. Then you are not employed regularly by them?

A. Yes, I am. Employed regularly only during the summer time, I was off a short time and came back. You asked me the last place I worked and I answered you.

Q. Prior to your going with the Municipal League, where had you worked, and for what length of time were you idle?

A. Well, I worked at various places; I was nearly two years with the American Chemical Company; a couple of years with, or a year and one-half or such a matter

with Winchel & Co.—manufacturing company—and I was a year with Poppenheimer's Spring Works.

Q. What length of time intervened between your last situation and your employment by the Municipal Reform League?

A. Oh, I understand you now, sir. I could not tell you the exact length of time—yes, I can, from the 13th of September until the 8th of October.

Q. What year?

A. '98.

Q. Well, where were you working on the 8th of October, or the 13th of October?

A. No, the 13th of September, you mean? Well, I worked on the steam canal bed that they had built to go up to the northern part of the country here, for Mr. Brown, I think.

Q. Your whole efforts, then, if I understood you correctly, Mr. Harrison, was going there in order to detect these people in the commission of some offense, and that was your object and purpose in going there, was it?

A. You have stated the matter correctly, but it is rather misleading in some ways. I was ordered to ascertain whether or not it was a fact that policy plays were brought across the river from Kentucky.

Q. I didn't ask you that; I asked you your purpose, not what you were asked to ascertain—was that your purpose?

A. Well, you will have to read that question to me again.

Q. Your whole efforts then, if I understood you correctly, Mr. Harrison, was going there in order to detect these people in the commission of some offense, and that was your object and purpose in going there, was it?

A. Partially?

By Mr. McPherson:

Q. You say partially, what other object had you besides that?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court counsel for the defendants at the time excepted.

A. I can not without going—yes, I can answer that categorically. I have got to show the reason, or else it would mislead and put me in a false position. I must say as a matter of justice to myself, that being employed by the League, I looked out for all violations of the law, not only this, but any other violation of the law, and I

had to use my own judgment in the reports. That was the object. And this was among the rest, that was all.

Q. You spoke in your cross-examination about C. P. plays; what did you mean by that—explain it to the jury.

A. Well, that is another policy lottery, called Colorado and Paducah, it is another branch of another people, and the people that Mr. Edgar represents probably used to handle that, but did not then at least; they would not take it from Mr. Hoff's shop, and I changed the play to the Frankfort, flat gig.

By Mr. Shay:

Q. How do you know Mr. Edgar represents any person?

A. Simply from observation and knowledge of what he collects and where he goes to.

Q. Then it is an opinion upon your part, deducted from that, is it?

A. Yes, sir.

Counsel for the defendants moved the court to rule out said testimony, the court overruled the motion, to which ruling of the court counsel for the defendants at the time excepted.

Q. Who comprise the Colorado and Paducah, who are they—who constitutes that body?

A. You will have to take general knowledge as you did before. They are represented by—they had their headquarters up about the Richelieu.

Q. I asked you who constitutes that concern?

A. As far as I understand Mr. Gable is one—I can not call that gentleman's name—I have got it on the end of my tongue but I can not call it.

Q. Did you ever speak to Mr. Gable?

A. No, sir.

Q. You don't know him?

A. Yes, sir, I do.

Q. Personally?

A. Well, no.

Q. And the other man that you say you have forgotten his name, do you know him personally to speak to?

A. No, sir.

Q. How?

A. No, sir. I know these men by studying the system, that is all.

Q. Then it is a—

A. Deduction, as before.

Q. Deduction?

A. Yes, sir.

L. A. Donohoo, being called by the government and sworn, testifies as follows:

By Mr. McPherson:

Q. You are one of the officers of the Cincinnati Police Force?

A. Yes, sir.

Q. How long have you been an officer of the police force?

A. Going on 14 years.

Q. Were you on duty upon the 4th day of October, '99?

A. Yes, sir.

Q. What station?

A. Second District.

Q. Seventh District?

A. Second.

Q. Where was your police headquarters?

A. Hammond Street Police Station.

Q. I will ask you to state if, on the morning of the fourth, or forenoon of the fourth, you met or saw John Edgar?

A. Yes, sir.

Q. When and where?

A. As he stepped off of the bridge at Second and Broadway.

Q. Which way was he going?

A. Coming this way.

Q. From where?

A. I could not say from where; he was coming over the bridge, coming this way.

Q. Over what river?

A. Over the Ohio river.

Q. Between what towns?

A. Between Cincinnati and Newport.

Q. Now, then, where did you see him?

A. Just as he came off of the bridge and stepped on to Second street, the intersection there of Broadway.

Q. What did you do, if anything?

A. Placed him under arrest.

Q. What did you do with him?

A. Walked him up to the Hammond Street Police Station, and there turned him over to the officer in charge.

Q. Who was the officer in charge?

A. Sergeant Clawson.

Q. Who was with you, Mr. Donohoo?

A. Officer Fricke.

Q. After he was turned over at the Hammond Street

Police Station to Officer Clawson, what was done, if anything?

A. He was registered and then searched.

Q. Were you present when he was searched?

A. I was standing on his left.

Q. State what was found upon him when he was searched.

A. Well, there was some change, silver money, I don't know the denominations of it nor the amount; there was also a small note book and some 2 or 3, or some 3 or possibly 4 slips of paper with figures on them.

Q. Could you identify those slips of paper, if you would see them?

A. I could not say that I could, because I didn't pay particular attention; the officer over me took those from him himself.

Q. What time in the morning was this, Mr. Donohoo?

A. It was about 10 minutes of 10, I think, when we first arrested him; he was registered at 10 a. m.

Q. After he was searched, what, if anything, was done with him?

A. I think he was taken back to the cell room and locked up.

Q. How long was he kept in the cell locked up?

A. I could not say further; I went back to my beat again.

Q. Who would be the proper officer to testify in regard to that?

A. Well, Sergeant Clawson would be, or Lieut. Hill, either one.

Q. Sergeant Clawson?

A. Or Lieut. Hill, either one.

Q. Did you ever arrest John Edgar previous to this time?

A. No, sir.

(Above question and answer withdrawn.)

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Louis Fricke, being called by the government and sworn, testified as follows:

By Mr. McPherson:

Q. You are a policeman on the force here in the city of Cincinnati?

A. Yes, sir.

Q. How long have you been on the force?

A. 10 years and about 6 months.

Q. Were you on duty upon the fourth day of October, '99?

A. Yes, sir.

Q. Your headquarters were where?

A. Hammond Street.

Q. Hammond Street Police Station?

A. Yes, sir.

Q. Did you see John Edgar upon the morning of the fourth?

A. Yes, sir.

Q. When and where?

A. About 10 minutes of 10 at the Central Bridge, Second and Broadway, at the entrance there.

Q. What bridge is that?

A. Called the Central Bridge.

Q. What two cities does it connect, over what river?

A. Cincinnati and Newport, over the Ohio River.

Q. Which way was Mr. Edgar going when you saw him?

A. Coming over the bridge from the Newport side.

Q. State what you did?

A. Stopped him and told him he was under arrest, and he asked me what for. I said "I guess you know"; he says, "Yes, I guess I do." And I took him up to the Station House and searched him—I searched him.

Q. What did you find upon him?

A. Found papers on him with numbers on; what they call policy slips.

Q. Could you identify these papers if you would see them?

A. Yes, sir.

Q. I hand you first Exhibit 6, and ask you if that was one of the papers found upon him that morning?

A. Yes, sir.

Q. I will now hand you four other papers and state if those were papers found upon him that morning?

The above question is objected to by counsel for the defendants, the court overruled the objection, to which ruling of the court counsel for the defendants at the time excepted.

A. That is one; that is another.

Said papers offered and read in evidence and marked Exhibits 7—8—9 and 10. Said papers are hereto attached.

Defendant excepts.

Q. Where were these papers found upon him?

A. Found in his coat pocket.

Q. What, if anything was done with Edgar after he was searched?

A. After he was searched he was locked up in a cell.

Q. Do you know how long he remained in the cell?

A. No, sir, I do not.

Q. Did Mr. Edgar make any other statement to you, other than the one you have stated to the jury?

A. No, sir, no other statement.

Cross Examination.

By Mr. Shay:

Q. When did you see these papers last?

A. The last time I seen them was at the Station House.

Q. When was that?

A. Why, when he was searched; after he was searched, and I turned them over to the sergeant.

Q. That was the last you seen of them?

A. After the sergeant—I seen the sergeant mark them; that was the last I seen of them.

Q. Did you mark them?

A. No, sir.

Q. Is there any mark on there by which you can designate it?

A. Yes, sir.

Q. What is that mark?

A. W. C., with a dash under it, right in one corner of it.

Q. That is the handwriting of Sergeant Clawson, you mean?

A. Yes, sir.

Q. Did you ever see Sergeant Clawson mark anything else?

A. No, sir—Oh, I seen him mark these.

Q. Are you familiar with his handwriting?

A. Well, kind of.

Q. Can you swear that was his handwriting?

A. I could, because I seen him mark it.

Q. Can you swear that that is his handwriting?

A. I could—certainly I could—after seeing him mark it.

Q. Were you behind the desk with him when he marked it?

A. Right in front of it; he was behind the desk; he marked them right in front of me.

Q. If he was to take a certain lot of numbers of the same character and mark W. C. upon them, you could not tell which was which, could you?

A. I don't understand.

Q. I say if he took a certain lot of numbers on four different papers, such as you have seen here, and they were similar numbers to these, on a piece of paper shaped about like this, could you tell the ones that were marked to-day from the ones that were marked on the third of October, or the fourth?

A. No, sir, I could not.

Counsel for the defendants move the court to rule out the testimony of the above witness as to the identity of the exhibits, 7, 8, 9 and 10, the court overrules the motion, to which ruling of the court counsel for the defendants at the time excepted.

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Edward Hill, being called by the government and sworn, testifies as follows:

By Mr. McPherson:

Q. You are a lieutenant of police?

A. Yes, sir.

Q. Of the Cincinnati, Ohio, Police Force?

A. Yes, sir.

Q. Lieutenant, have you heard from Sergeant Clawson this morning?

A. Yes, sir. Sergeant Clawson is sick in bed.

Q. Unable to attend court?

A. Yes, sir.

Q. Can you tell me how long Mr. Edgar remained in jail or in the Police Hammond Street Station, after he was searched upon the morning of the fourth?

(Objected to, overruled and exception.)

A. I don't know.

Q. Will your records show?

A. No, sir.

Q. Will your records show who went upon his bond, if a bond was given?

A. The bond will show at Mr. Bender's office, or at the Police Court.

Q. At the City Building?

A. Yes, sir.

Q. Who should we ask for that there?

A. Thomas Noctor.

Q. Were you on duty at the time Mr. Edgar was arrested?

A. I was on duty two different occasions when he was arrested. I arrested him on two different occasions.

(Upon application by counsel for the defendants the above answer is stricken out.)

Q. Upon October 4th, '99?

A. I don't know anything about that arrest.

Q. Were you present at police headquarters that day at Hammond Street Station?

A. I think not, not at that date.

Q. How long have you been lieutenant of police?

A. Nearly six years.

Q. Do you know Charles W. Reilley?

A. I do.

Q. Do you know John Edgar?

A. I know Peter Edgar.

Q. Peter Edgar—John Edgar—stand up Mr. Edgar—do you know that gentleman?

A. I do.

Q. How long have you known him?

A. Oh, I have known him 2 or 3 years—2 years anyhow.

Q. To your knowledge, what business has Mr. Edgar been in in the last two years?

(Above question objected to.)

Q. What knowledge have you of the business engaged in by Mr. Edgar prior to October 4th, '99?

By the Court: Lieutenant, that question does not call for a statement as to what his business is, but what knowledge have you of his business—Do you know what kind of business he has been engaged in?

Mr. Shay: I wish to reserve an exception.

A. I know he is engaged—

Q. You need not state what he is engaged in, but do you know what kind of business he has been engaged in for the last two years, without stating what he does?

A. Well, yes, I know.

Q. Now, you may state what it is.

By Mr. Shay:

Q. Did you ever speak to any of his employers about employing him?

A. No, sir.

Q. Did you ever speak to him about his employment?

A. No, sir.

Q. Then what you know is from general rumor, is it?

A. No, not from general rumor; what I know is what I see of him and where I see him.

Q. That is your opinion deducted from what you have observed of his conduct?

A. And finding him in these places.

Q. Seeing him in places?

A. No, sir, I found him—I found him in these places.

Q. That is the only means upon which you base your opinion that that is his business?

A. Well, that is all I have to base it on, yes, sir.

The Court: I do not know what the Government expects to show by this witness, but, if through observation, he knows that this defendant was engaged in the lottery business within the last year or two, or that upon former occasions other than the one of October 4th, he was arrested and searched and papers of a character of this offered in evidence here were found upon him, I think those facts are relevant to the issue here and would be permitted to go to the jury for what they are worth, and what they are worth is to be determined by the consideration of all the circumstances which should go to give weight or take from the value of the testimony presented. It may be, when the testimony given by the witness is sifted by cross-examination, it may appear his knowledge is very meager and the testimony of little value, or, it may, when so tested appear that it is of value, and if it is pertinent it should be taken into the account in the determination of the issue. If, within the view of the court as indicated, this witness has any testimony, or can give any testimony which would be legitimate, counsel for the government may proceed. Counsel for the government now understand the limits which the court intends to place upon this character of evidence and the court will expect counsel not to call for anything outside of the limits that are fixed; to all of which defendant excepts.

Q. State how long you have known Mr. Edgar?

A. I think I have known Mr. Edgar about 2 years, probably a little longer.

Q. During that time how often have you seen him?

A. Well, in the last year I have seen Mr. Edgar, I suppose, 50 times. Probably oftener than that.

Q. Where generally did you see him?

Mr. Shay: To all these questions I may have the benefit of exceptions?

The Court: Yes.

A. I have seen him going into the rear of 114 or 116 East Sixth Street; I have seen him in the room, second floor 114 or—

The Court:

Q. What place is the one first mentioned?

A. That is Reilley's, up stairs adjoining Reilley's office. That is where I have seen him going in and out and in these rooms.

Q. From where you have seen him and your observation of him during this time, you may state what employment or business that Mr. Edgar is in?

(Objected to. Exception.)

The Court: What did you see him do in this place?

The Witness: Whose, Mr. Reilley?

(Objected to.)

The Court: Answer that question if you know who he is?

A. I know him, I know him very well; I know him to be a policy writer.

Mr. Shay: I ask to have that ruled out?

The Court: Do you know what business he is engaged in?

A. Writing policies.

Mr. Shay: That ain't the question the court puts to you.

The Court: He may answer that question.

Mr. Shay: I desire an exception.

By Mr. Bundy:

Q. Where is Mr. Reilley's place of business?

A. In the rear of 114 E. Sixth street.

Q. That is the place you allude to when you state you saw Mr. Reilley going into 114 East Sixth street—Mr. Edgar?

A. Yes, sir.

Q. Mr. Reilley is the gentleman back here?

A. Yes, sir.

Q. A defendant in this case?

A. Yes, sir.

Q. The room above Mr. Reilley's, what kind of a room is that you speak of you have seen Mr. Edgar in?

A. There is two rooms above the rear rooms, that is they front on the alley.

(Objected to and exception.)

Q. The room I am speaking of as occupied by Mr. Edgar—what is carried on or done in that room, if you know?

Mr. Shay: Exception.

A. I don't know only by what I found in the room.

Q. What did you find in the room?

A. I found policy slips; I found dream books; I found this thin tissue paper with a black sheet between other sheets and figures on it, and drawings—figures or drawings on a small piece of paper.

The Court: What do you mean by drawings?

A. It is a lot of numbers that are printed first, in an uneven way, then they are placed in a straight line in

numerical order, that is the smallest first then so on up,

Q. Something like this you mean (handing witness Exhibit No. 3).

Mr. Shay: Exception.

A. Yes, this is just something similar to what I have seen or found in there.

Q. Do you know what those articles and things that you have enumerated that you found in that office, were used for?

(Above question objected to.)

The Court: He may answer. He is asking if he knows what they are used for?

A. Yes, sir. They are policy drawings used for to display to people who have wagered their money on this game.

Q. When was the time you have described you have seen Mr. Edgar in this room?

A. One time was on the 12th—on the afternoon of the 12th, of May, 1899, and another time was on the afternoon of February 6th, 1900.

Q. Upon these occasions how did you happen to be in that room?

Counsel for the defendants move the court to rule out all that portion of the testimony of above witness with reference to what he saw and heard, as occurring upon the day of February, 1900; the court overrules the motion, to which action of the court, counsel for the defendants at the time excepted.

Q. How did you happen to be in this room upon these dates mentioned?

A. I went there to make a raid—to make arrest.

(Above question objected to and withdrawn.)

Q. What did you do when you went there upon the 12th of May, '99 and February, 1900?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court, counsel for the defendants at the time excepted.

A. On the 12th of May I arrested—

The Court: Well, you went there to make arrests?

A. Yes, sir.

By Mr. McPherson:

Q. Who did you arrest?

Above question and answer objected to by counsel for the defendants.

The Court: I think it is going too far for the purpose for which this evidence is offered. I want to say to the

jury that when the court rules that testimony is incompetent, or when the court orders it to be stricken out, the jury should, at the same time, strike it out of their memory and be careful not to consider it and take it into the account, because it is then out of the case and the minds of the jury should not be influenced by it.

Q. State, if you know, what Edgar's business or occupation was during the year '99?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court counsel for the defendants at the time excepted.

A. I can't say, only as I answered before.

Q. That is what we want?

A. By seeing him entering—leaving and entering this place and finding him in these rooms.

Q. What would you say his business was?

A. He gave his business as collector or agent.

Q. Collector of what?

A. He didn't say.

Q. I say from your judgment what would you say his business was?

(Above question objected to.)

The Court:

Q. You say he gave his business as collector?

A. Yes, sir.

Q. When was that?

A. I think both times as collector—he gave his occupation as collector.

Q. This gentleman here (indicating) what do you know his name as— the one that I am speaking of?

A. Peter Edgar.

Q. Do you know him under any other name?

A. I do not.

Cross-Examination:

By Mr. Shay:

Q. Lieutenant, just a word or two please. Where were you located—in what district during the last year?

A. In Hammond Street, in this District.

Q. In Hammond street?

A. Yes, sir.

Q. All the time?

A. The Second District—yes, I have been continuously in the Second District, it will be a year the 17th day of next month.

Q. Will you state to the jury what were your intervals of duty in the various months?

A. Well, we alternate. One month my hours of duty are from 7 in the morning until 3 in the afternoon, and the next month from 3 in the afternoon until 11 at night; the following month from 11 at night until 7 in the morning. Two months day and one month night.

Q. What months were you on in day?

A. In April the last half of April I was on in the morning. I transferred over on the 17th of April and was on in the morning up until the 1st of May, from 7 until 3.

Q. Transferred where from?

A. From York street, Fifth District.

Q. How long had you been in York street?

A. Well, I had been in York street—I will tell you in a minute—I guess about 8 months.

Q. Well, then, preceding April, you didn't see Edgar any time during that 8 months, did you?

A. No, sir.

Q. It was after you came from York Street, commencing with last April?

A. Yes, sir, as soon as I came in this District.

Q. Now, then, do you remember how many times you saw him in the month of May?

A. Oh, I can't remember; I have seen him a great many times in a year; I don't keep account of it.

Q. In the month of May?

A. No, I could not tell you.

Q. Can you call to mind whether you saw him at all in the month of June?

A. No, sir. I don't think I did because in the month of June I was on night duty.

Q. In the month of June you were on night duty?

A. Yes, sir.

Q. Well, in the month of July?

A. No, I will not tell you the months. In the month of July I was on the morning watch.

Q. Or in the month of August?

A. In the month of August, I was on the afternoon watch.

Q. September?

A. September I was on at night.

Q. October?

A. In the morning.

Q. November?

A. Afternoon.

Q. In December?

A. Night.
Q. January?
A. January, morning.
Q. Do you remember of seeing him in December or January?
A. Yes, sir.
Q. How often?
A. Oh, I could not tell you that; I didn't keep note of it how often I seen him.
Q. Well, last October then you were on night duty, were you?
A. Sir?
Q. Were you on night or morning?
A. If you will follow that up, I can tell you.
Q. Have you any recollection whether you were on night duty or day duty in October?
A. I was on morning in October.
Q. What do you mean by morning?
A. From 7 until 3.
Q. From 7 until 3?
A. Yes, sir.
Q. Who was your Sergeant?
A. Sergeant Clawson.
Q. You were not present on the morning of the arrest of this defendant?
A. No, sir, I was out in the district making my rounds.
Q. You were not present?
A. No, sir.
Q. You say you found dream books in there—in this room on Sixth street?
A. Yes, sir.
Q. Can you say to this jury whether those (showing witness paper) were ever placed in the hands of anybody to your knowledge?
A. That I can not say.
Q. You say you found certain things in there that you call numbers?
A. Yes, sir.
Q. Slips. Can you say they were ever placed in the hands of anybody?
A. I can not say that.
Q. You say you found slips that you call policy slips, do you mean there were simply numbers on there?
A. Such as were shown to me here.
Q. Shown to you?
A. Yes, sir.
Q. Whether they were ever used in that business or not, you don't know of your own knowledge?

A. Not those numbers, I don't know.

Q. The numbers that you found in that room?

A. I know it was a policy office; I found them in there.

Q. The numbers you found in that room, you don't know whether they were ever used in policy or not, as a matter of fact?

A. No, I could not say that.

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D. Edwin Smith, being called by the government and sworn, testifies as follows:

By Mr. Bundy:

Q. Where do you live?

A. Newport, Ky.

Q. You are an officer of the Newport police?

A. Yes, sir.

Q. What is your office?

A. At the present time I am acting Chief of Police.

Q. Who was acting Chief of Police upon the morning of October 4th, 1899, in Newport?

A. Charles Schilling.

Q. Where is Charles Schilling now?

A. He is dead.

Q. Were you appointed acting Chief of Police upon his death?

A. Yes, sir.

Q. I will ask you if you have in your possession certain papers taken off of Anthony Hoff by Chief of Police upon the morning of October 4th, 1899?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court, counsel for the defendants at the time excepted.

Q. Have you some papers in your possession?

A. Yes, sir.

Q. Will you deliver them to me?

A. Yes, sir.

Q. Will you state where these papers came from?

A. I found them in the safe of the Chief of Police's office, after Charles Schilling's death, three days I believe after his death.

Q. Have they been in your possession as acting chief of police since that time?

A. Ever since that time, yes, sir; just as you have them there, the way I found them.

Q. When did the chief of police die?

A. The 20th day of February, 1900.

Adam Lieberth, being called by the government and sworn, testifies as follows:

By Mr. McPherson:

Q. Where do you live?
A. Newport, sir.
Q. Are you an officer of the Newport police?
A. Lieutenant.
Q. How long have you been Lieutenant of Police at Newport?
A. The first of February a year ago last.
Q. Are you still acting as Lieutenant of Police?
A. Yes, sir.
Q. Do you know Anthony Hoff?
A. Yes, sir.
Q. Do you see him in the court room?
A. Yes, sir.
Q. Is he one of the defendants sitting back by his counsel?
A. Yes, sir.
Q. Did you see him on the 4th of October, '99?
A. Yes, sir.
Q. When and where?
A. In Newport on Monmouth Street between the hours—somewhere in the neighborhood of 11 o'clock.
Q. Under what circumstances did you see him?
A. I met him there in a barber shop conducted by him.
Q. How did you happen to meet him?
A. There was a man by the name of Pelton applied to the Newport Chief of Police, to me Chief of Police for an officer and the chief detailed me on the case with this man Pelton, and that morning I went to the place—to the barber shop conducted by his man Hoff.
Q. What did you do there?
A. I opened a little drawer—he had a stand—something on that order, a little stand there of some kind that had drawers in it, and out of that drawer I got some papers, which afterwards were turned over to the chief of police.
Q. Can you identify these papers that you got from that drawer?
A. I think I can.
Q. Well, what else did you do there that morning?
A. Placed Mr. Hoff under arrest and brought him to the police office.
Q. Why did you place him under arrest?
(Above question objected to and withdrawn).
Q. What charge was placed against him?
A. As to the direct charge I never could—that was

conducted by the Chief of Police and I could not state now the exact charge. I think conducting a game of chance, something on that order; I am not positive as to that.

Q. I will hand you a number of papers and ask you to look at them and see if you can identify them in any manner?

A. These sheets here with numbers on—this little ticket and these two pieces of paper were in the drawer, or sheets similar to this. These are the identical ones that were turned over to the chief of police; these kind of papers were taken out with this little ticket with Number 91320 on it, and these two pieces of paper were taken out of the drawer in Hoff's barber shop. And these two pieces of paper (indicating) after Hoof was taken down to the police office, I was directed to take him in the office and search him, and those two pieces of paper were found in his clothes.

Q. The papers that you found that you say were similar to those, what did you do with them?

A. Turned them over to the Chief of Police and he locked them in the safe.

Q. Who was your chief of police at that time?

A. Charles A. Schilling.

Q. Mr. Schilling—

A. Died.

Q. February of this year?

A. Yes, sir.

Q. Which were the ones you found upon his person when you searched him at the office?

A. These two (indicating).

Said papers are introduced and read in evidence and marked Exhibits 11 and 12. Said Exhibits 11 and 12 are hereto attached.

To the reading of said Exhibits 11 and 12 in evidence counsel for the defendants excepted.

Papers heretofore referred to were also offered and read in evidence, and marked Exhibits 13, 14 and 15. Said Exhibits 13, 14 and 15 are hereto attached.

To the offering and receiving Exhibits 13, 14 and 15 in evidence, counsel for the defendants excepted.

Q. State to the jury the date this was.

A. October 4th.

Q. And what time in the day?

A. Pretty close to 11 o'clock—between 10 and 12 o'clock.

Q. October 4th of what year?

A. '99.

Q. 1899?
A. Yes, sir.
Q. This was where?
A. Newport.
Q. What state?
A. Kentucky.

Counsel for the government offer prints in evidence marked Exhibit 16, hereto attached. Counsel for defts. except to receiving said papers in evidence.

Cross-examination:

By Mr. Shay:

Q. What hour in the day was this?

A. It was between 10 and 12 o'clock; closer to 11 than either one of the other two.

Q. Did I understand you to say that all you can state with reference to this bundle of papers marked Exhibit 16 is that they were papers somewhat similar in general appearance to the ones you found?

A. They were the papers that we found.

Q. Did you put any mark upon them?

A. Not on these particular ones; I did on some of the others that were put in the same bundle.

Q. Are you able to say that these are the identical papers that you found in the house of Mr. Hoff?

A. I think there is no question about it.

Q. Are you able to swear to it?

A. I could unless they have been switched since they came in the court room.

Q. What mark is there on them that would enable you to identify them?

A. This inscription on the back was on that one bundle and they were classed with other papers that were put on the inside when they were folded together.

Q. What inscriptions put inside?
A. The papers that were marked.
Q. What was marked on the back?
A. No marks.
Q. The back of this bundle?
A. There was an H and a little lead pencil mark.
Q. Who marked them?

A. They were marked after I got them out of the drawer.

Q. Who done it?

A. I don't know; they were marked after I got them out of the drawer.

Q. In what drawer?

A. The drawer to some desk he had over there in which he kept them in.

Q. Where was the defendant at, at that time?
A. Mr. Hoff?
Q. Yes?
A. He was there.
Q. What was the number of the ticket—that lottery ticket that you found?
A. 91—
Q. There was a number at the bottom towards one end?
A. 91320.
Q. Did you make any memorandum of that?
A. I remember that.
Q. You remember that?
A. Yes, sir.
Q. What did you make the memorandum of it in?
A. Well, I have a little book, I have for my own purpose.
Q. Where is the book?
A. Over in the office somewhere.
Q. When did you look at it last?
A. I don't know that I looked at it at all.
Q. You haven't looked at it any time?
A. I think not.
Q. You have borne that in mind since last October?
A. 91320?
Q. Yes?
A. Oh, yes.
Q. Did you ask him anything about this?
A. Well, we had a little talk there in reference to playing policy and he tried to convince us that he didn't have any office. We thoroughly searched the place, stove, and any place I might think there was anything.
Q. That is all you found?
A. That is all I found.
Q. Did you ask him about this?
A. Well, not in particular.
Q. He told you he had bought it did he?
A. No, I don't think he did.
Q. Did he tell you anything about it?
A. Not that particular ticket, no, sir.
Q. Did he tell you anything about it?
A. That ticket was found on his person.
Q. Did he tell you anything about it?
A. That is what I got after he was in the police office. No, sir.
Q. He didn't tell you anything?
A. No.
Q. You didn't ask him anything about it?

A. Not about the ticket in particular.
Q. You found this where?
A. In his vest pocket.
Q. In his vest pocket?
A. Yes, sir.
Q. Where did you find that (showing witness a paper)?
A. The same place.
Q. Exhibit 11 and Exhibit No. 12. Did you ask him anything about either of them?
A. No, sir.
Q. Where did you find this Exhibit 15, Kentucky Lottery?
A. That was in the inside of the sheets there.
Q. Did you ask him anything about it?
A. No, sir.
Q. You looked to see what this was, did you—did you read it over?
A. From what information I ascertained from it, I understood it was a lottery ticket No. 91320.
Q. You understood the lottery had occurred one month before the arrest?
A. I didn't pay that much attention to it.
Q. You noticed this was a drawing in September?
A. I didn't pay that much attention.
Q. Didn't you see it was a drawing on Saturday, September 20th?
A. No, sir; I didn't read it. I am not so familiar with lotteries.
Q. Yet you remember the number?
A. Yes, sir.
Q. Didn't you notice this was an advertisement of the prizes that were drawn September previous to the arrest?
A. I didn't pay so much attention to that.
Q. Did you read it?
A. No, sir.
Q. You don't know what it was?
A. I didn't pay much attention to it.
Q. Yet you kept it, is that right?
A. That was folded up with the balance of the papers, yes, sir.
Q. Where did you find this paper?
A. This one—that was in the drawer with the others.
Q. In the drawer?
A. Yes, sir.
Q. Was it under lock and key?
A. No, sir; the drawer was closed but it was not locked.
Q. Anybody else in the office with him at the time?

A. Mr. Pelton went in; Pelton and I went in together.

Q. You say this is on what street—what street was this on?

A. Saratoga street.

Q. You said Monmouth street in your direct examination?

A. Saratoga street, the street the railroad runs on. If I did I made a mistake in that, if I said Monmouth street.

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Lieut. John Poppe, being called by the government and sworn, testified as follows:

By Mr. McPherson:

Q. You are one of the police lieutenants of the Cincinnati police force?

A. Yes, sir.

Q. How long have you been lieutenant of police?

A. 7 years.

Q. Do you know Charles Reilley?

A. Yes, sir.

Q. Is that he gentleman sitting there—how long have you known him?

A. About 15 years.

Q. Where is his place of business, if you know?

A. 114 East Sixth street.

Q. How often have you seen Mr. Reilley in the last 14 years?

A. I have seen him some, of course, while I was in the Second District, doing police duty there; I would see him almost every day or morning or afternoon duty; of course not at night.

Q. Within the last 5 years how often have you seen him?

A. Oh, I may have seen him a couple of hundred times during that time.

Q. Do you know what business Mr. Reilley is in?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court, counsel for the defendants at the time excepted.

A. I don't know of any except by reputation.

Q. From your own knowledge do you know what he does?

A. I have arrested him for—

(Above answer objected to and exception.)

Q. From your own knowledge do you know what he does?

A. No, sir.

Q. Have you been in his place of business in the last year or two years?

A. I have been in the last two years, yes, sir.

Q. What have you seen when in his place of business?

(Above question objected to.)

Q. Did you observe anything when in his place of business when you were there that would indicate the character of the business he was engaged in?

A. Yes, sir.

Q. You may state what that was that you observed in his place of business?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court counsel for the defendants at the time excepted.

A. I have found slips in there with numbers on them; also sheets, printed with numbers such as is used by policy dealers.

Q. Showing you Exhibit 3, such sheets as that?

A. Yes, sir; such sheets as those.

Q. Fix the time that you seen these in his place of business?

A. I don't remember the exact date, sometime though I believe during the year '98.

Q. Sometime during the year '98?

A. Yes, sir, '98.

Q. Who was with you at that time?

A. I forget—the officer patrolling the beat.

Q. At what place was this?

A. 114 East Sixth street.

Q. Who else was there in there at the time you were there?

A. No one but Mr. Reilley.

Cross-examination:

By Mr. Shay:

Q. You say all you know is by the general *reputation*?

A. Yes, sir; that is all.

Q. About his business. And that it was sometime in the year '98 that you observed these in his place. Now, what time in '98—will you try and fix it as near as you can?

A. I can not, no, sir.

Q. Well, can you tell us whether it was as early as June?

A. No, I think it was later.

Q. Well, how much later?

A. It may have been a month or two later.

Q. It may have been a month or two later?

A. Yes, sir.

Q. Then in all probability sometime in July, between July and September?

A. Yes, sir.

Q. Of '98?

A. Yes, sir.

Counsel for the defendants move the court to rule out the testimony of the above witness, the court refuses so to do, to which ruling of the court, counsel for the defendants at the time excepted.

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Frank L. Hoff, being called by the government and sworn, testifies as follows:

By Col. Bundy:

Q. Where do you live, Mr. Hoff?

A. 742 Hopkins.

Q. What is your business?

A. I am chief bookkeeper of the Western Union Telegraph Co.

Q. How long have you been engaged as chief bookkeeper of the Western Union Telegraph Co.?

A. About 3 years and one-half.

Q. Were you on duty between the 1st and the 6th of October of last year?

A. Yes, sir.

Q. Where is their office or place of business?

A. On the northwest corner of Fourth and Vine.

Q. In Cincinnati?

A. Cincinnati, Ohio.

Q. Do you know the defendant, John Francis?

A. No, sir.

Q. Did you bring any telegrams with you?

A. No, sir; when I left I had gone through our files for the 1st, 2nd, and half of the 3rd—that is, I had my clerks go through them and look for all telegrams signed "John Francis," or "W. C. Francis, Jr., & Co.," and I found nothing in those two days and a half; I left three clerks in charge to go through the rest of the days. I got a phone message from the clerk I left in charge saying that he went through the balance of the days, the 6th included, and found nothing signed "Francis," or "W. C. Francis, Jr., & Co."

Q. Now, Mr. Hoff, did you find any telegrams in cipher during those days, that had reference to the lottery or policy business?

A. Well, our rule is not to overhaul the body of any telegrams. All we use in our department is the check and the amount and the destination of each telegram in our department.

Q. You say you looked over all the files of all telegrams for these three days. Now, I am asking you if you found any?

A. I found nothing signed "Francis."

The Court: That is not the question.

A. Well, we have from 19 to 22,000 telegrams a day. Of course, I can not in looking for telegrams—all I can do is to take the name given. If it is not in our files I would have to say no.

Q. Do you know the name under which these people operated in the policy business?

A. I do not know.

Q. Through your company?

A. I don't know the parties, that is "Francis" or "Francis, Jr., & Co."

Q. Well, that does not answer the question, if your honor please. Do you know the name under which these people operated in the policy business through your company?

A. No, sir; I do not.

Q. Do you know the name under which these policy dispatches are given to your office?

A. I could not tell a policy dispatch from any other, because we have a great many cipher messages. I could say whether they were policy or not.

Q. How thorough examination did you make?

A. Well, during last night I worked until about 11 o'clock and I overhauled the first of October, which was on a Saturday, and I found nothing in there; it being a very tedious job, I referred my case to the manager, he said, "well, put the clerks on it," so this morning I put three clerks at it.

Q. Do you keep the accounts of the Western Union Telegraph Co.?

A. Yes, sir.

Q. Do you have any account with W. C. Francis, Jr., and Co.?

A. I don't find the name on the books.

Q. Do you find the name of W. C. Francis, Jr.?

A. No, sir.

Q. Do you find the name of John Francis?

A. No, sir.

Q. Your office is up stairs?

A. On the fourth floor, yes, sir.

Q. Do you know what this defendant, John Francis, comes to the Western Union Telegraph Office for every day and sometimes twice a day?

A. I don't know the gentleman or I don't know any of the senders. I very seldom go in the receiving department.

Q. Are messages often signed in cipher?

A. Well, in our work we don't pay any attention to the signature. We just merely take the check.

Q. Answer that question, if you can; if you don't know you can say so.

(The stenographer reads the above question.)

A. I don't know, as they are signed cipher.

Q. Do you know of any telegrams signed by S. T. Dickerson & Co.?

A. No, sir.

Q. Have you any book acount with S. T. Dickerson & Co.?

A. That I don't know. I don't think we have. We have about 800 firms that have charge accounts with us.

Q. Were you bookkeeper 3 or 4 years ago?

A. I think it was in '96; I don't remember exactly, I think it was September, '96, I was appointed chief bookkeeper.

Q. Do you remember an account kept at that time with S. T. Dixon & Co. or S. T. Dickerson & Co.?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court counsel for the defendants at the time excepted.

A. No, sir; I do not.

Q. Do you know whether there is an account of that kind kept now with the Western Union Telegraph Company?

A. Well, I looked it up this morning and find that there is no account kept with them.

Q. How did you happen to look up S. T. Dickerson & Co., or S. T. Dixon & Co.?

A. It would make it an easy matter for me to get at the messages in the files if they had.

Q. How did you know that that name would be called for—it did not occur in the subpoena, did it?

A. Yes, sir.

Q. S. T. Dixon & Co.?

A. Oh, I had reference to Francis. I don't know of

any Dickerson or Dixon having an account with us.

Q. Do you know as a matter of fact whether or not a large number of telegrams go through your office that have reference to the lottery and policy business nearly every day?

A. No, sir.

Mr. Bundy:

We will excuse you for a minute.

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C. H. Woellner, being called by the government and sworn, testifies as follows:

By Mr. Bundy:

Q. Where do you live, Mr. Woellner?

A. Cincinnati, 1819 Elm street.

Q. What is your occupation?

A. I am employed by the Western Union Telegraph Company.

Q. At 4th and Vine streets in this city?

A. Yes, sir.

Q. In what capacity?

A. I receive at the counter, look after branch offices, straighten out claims—general work.

Q. How long have you occupied that position?

A. About 3 years—pretty near three years.

Q. Were you on duty during the months of September and the early part of October, '99?

A. I suppose I was; I don't remember of being sick so I expect I was.

Q. Do you know this defendant, John Francis?

A. I know him; yes, sir.

Q. Under what name do you know him?

A. I know him only by his forename, surname, John.

Q. Did you ever know him by the name of Prior?

A. No, sir.

Q. Where did you get acquainted with him?

A. I got acquainted with him at our office.

Q. At what time?

A. I can not recall the exact date, but I suppose it would be probably two years ago.

Q. Does he come to your office very often?

A. I meet him there frequently.

Q. How frequently?

A. Well, sometimes I will see him twice a week, sometimes three times, not more than that.

Q. What does he do at your office?

A. I am personally acquainted with him; I have talked with him very frequently; we have known each other for some time; he comes up to our counter; he, at one time, a very long time ago, sent a telegram, if I remember right, to his wife who was away.

Q. You know him intimately—he calls in to see you—is that correct, and talk over social matters?

A. Talks matters socially, what do you mean?

Q. I mean just what I say?

A. We speak on various topics, not necessarily social.

Q. What do you talk about when he comes in there?

A. He comes in and he says "hello, Carlie;" I will say "how do you do, John."

Q. You know him very well, as I understand you, he comes in 2 or 3 times a week to see you, and yet you never knew his last name?

A. I knew it after the papers announced it in '99, I think it was.

Q. Did you ever know it preceeding that time?

A. No, sir.

Q. At what hours are you on duty?

A. Well, I am on duty between 7:30 and 5:30.

Q. Isn't it a fact that this man, John Francis, has been in the habit of coming into the Western Union Telegraph office nearly every day about noon and about 5 o'clock in the afternoon?

A. I know nothing about 5 o'clock in the afternoon, but I can say, just as I said before, I have seen him as many as 2 or 3 times a week.

Q. Answer the question. I want an answer, yes or no. Isn't it a fact that this man, John Francis, has been in the habit of coming into the Western Union Telegraph office nearly every day about noon and about 5 o'clock in the afternoon?

A. I say no as to every day. About coming in at noon I don't know that to be a fact, and I can't answer that way, but I know he has come in there as many as three times a week.

Q. Don't he come in oftener than three times a week?

A. Not to my knowledge, sir.

Q. Who receives—who received the telegram that one time he sent to his wife?

A. Well, I don't know that it was his wife, but I received that telegram.

Q. Is that the only telegram you ever received from him?

A. That is the only telegram to my knowledge that he sent with me since I have been receiver.

Q. Who else receives telegrams for the Western Union company?

A. Receiver Krumbeck and Miss Madden.

Q. How long has Miss Madden been there?

A. Since last August.

Q. What hours is she on duty?

A. She comes at 8 and remains until 7.

Q. Aren't telegrams sent by the Western Union company that do not go into the hands of the regular receivers?

A. Are they not?

Q. Are there not telegrams sent by the Western Union Company from the Cincinnati office, that do not go through the hands of the regular receivers?

A. Well, they certainly do go through, because they have got to be accounted for.

Q. I insist upon having an answer to the question, Mr. Woellner?

A. Not to my knowledge.

Q. Are you in a position to know whether any such telegrams are sent?

A. Well, I am at the counter at certain times in the day; I can not say that I know as to every telegram that is filed over our counter, because it would be utterly impossible to remember them. At certain times of the day I am.

Q. That is not an answer to the question. Are you in a position to know, Mr. Woellner, whether or not telegrams are sent through the Western Union office that do not pass through the hands of either Mr. Krumbeck, Miss Madden or yourself as the receivers?

A. Well, ordinarily they must pass through the receiver's hands. I want to say one thing in connection with that, I think the court will allow that: there are times, your honor, when we are crowded at the counter, 4 or 5 customers, when a receiver is at dinner, a delivery clerk comes in and helps out, or any other clerk is called upon just as the occasion may require, and I can't say that I am in a position to know all about every telegram that goes into the office, whether or not it actually passes through the receiver's hands; we have got six delivery clerks, and at times they have been called to the counter to receive telegrams. That is not regular—I don't want you to place that construction upon it at all—but there are times; consequently, I would be unable to know as to every telegram, or even answer your question.

Q. Is there a class of business as such that goes through the office of the Western Union that does not pass at all through the hands of the regular receivers?

A. Not to my knowledge, sir.

Q. Now, let us return to these visits of 3 or 4 times a week, of Mr. Francis to you. How long does he remain in the office?

A. Well, some times 5 minutes, as high as 15.

Q. How many messages do you receive in the course of a day?

A. One receiver at the counter, I should judge, would, on a busy day, receive from four or five hundred messages.

Q. Does Francis talk to anybody else except you?

A. I have seen him talk to other gentlemen in the office.

Q. Who else have you seen him talk to?

A. Well, he has a good acquaintance, I have noticed, and very frequently speaking to other gentlemen.

Q. Do the rules of the Western Union Company permit gentlemen to come in there and spend 15 minutes at a time simply talking to the clerks without any business?

A. That is a public place; they come in there and stand around in the railroad office, come in with companions, and at times you will find any way from 30 to 40 people in the office. Oh, yes, they permit it, but they do not allow them to go in the enclosure.

Q. Who else of your friends call to talk over various matters, social and political, and spend a few minutes a day with you?

A. I have got numerous friends. What, do you want me to give names?

Q. I would like to know how many there are come in and spend 15 minutes at a time with you?

A. I know probably a half dozen.

Q. How often do they come in?

A. Some come in every day; some once a week.

Q. Do you know their last names?

A. Some of them.

Q. Does Francis directly or indirectly, or any way, to your knowledge, send any telegrams through the Western Union office?

A. No, sir.

Q. Do you say positively that he does not send any?

A. Just the one I spoke about; that is the only one I know.

Q. Do you get any telegrams that are merely signed "John?"

A. No, sir; we get them from people from time to time, that sign only their surnames, but I can not say that I get any merely signed "John."

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Morris Kromback, being called by the government and sworn, testifies as follows:

By Mr. Bundy:

Q. Where do you live, Mr. Kromback?

A. 1204 Main street.

Q. What is your business?

A. I am a receiver at the Western Union Telegraph Company.

Q. How long have you been receiver at the Western Union Telegraph Company?

A. I have been receiver for the past three years.

Q. What hours are you on duty?

A. From 7 o'clock in the morning until 5 at night.

Q. Were you on duty during the months of September and October of last year, and months preceding that?

A. Yes, sir.

Q. In the same capacity?

A. Yes, sir.

Q. At the office on the ground floor, Fourth and Vine streets, this city?

A. Yes, sir.

Q. Do you know this man John Francis?

A. I know him by sight.

Q. How often have you seen him?

A. Well, I see him occasionally.

Q. Well, how often?

A. Well, I don't—some times twice a week, some times three times a week.

Q. Don't you see him some times twice a day?

A. No, sir.

Q. What hours does he come in there?

A. Well, generally I see him around—well, some times around 12 o'clock.

Q. What does he do when he comes there?

A. Well, he does not file no messages.

Q. Does not file papers with you?

A. No, sir.

Q. Hasn't he handed you papers?

A. Well, very seldom; no, he never does.

Q. He never does?

A. No, sir.

Q. Very seldom?

A. He never handed me papers.

Q. What does he hand you?

A. Nothing.

Q. You are sure of that?

A. I am.

Q. Did you ever see him there about 5 o'clock in the evening?

A. I get off a few minutes before five.

Q. What does that man do when he comes into the office of the Western Union Company?

A. Well, he generally speaks to Mr. Woellner.

Q. Who else?

A. Mr. McClure some times, then myself on topics—occasional topics.

Q. What does he talk to you about?

A. Oh, about the weather, or anything like that.

Q. He never talks to you about business?

A. No, sir.

Q. How long does he stay in there at a time?

A. Oh, he don't stay there no longer than a half minute, maybe not that long.

Q. Didn't he come in there some times and stand 15 minutes talking about the weather and general topics of that sort?

A. No, sir; not to my knowledge.

Q. Do you see him every time he comes in about the noon hour?

A. Not every time; some times I am so busy I can't see him.

Q. Isn't it a fact that he has handed you hundreds of papers or messages?

A. No, sir.

Q. Within the last two years?

A. No, sir; he has not.

Q. Do you swear to that positively?

A. I do; that he handed me papers.

Q. Do you understand that you are called upon to *testify the truth and whole truth and nothing but the truth*?

A. Yes, sir. You are stating about him handing me papers?

Q. You are called on to tell the whole truth. Do you say he never handed you papers?

A. No, sir.

The Court:

Q. Did he bring papers there that you got possession of?

A. Well, he never—

Q. Answer the question—

A. I never had possession of any papers. I might handle it unknown.

Q. I am talking about what you know now. Did he ever bring any papers there into your office that came into your hands whether he handed them to you or not?

A. Well, I can see papers going up stairs.

Q. From him?

A. Some times from him.

Q. Who sent them up stairs?

A. Well, whoever is there. I am very seldom there at the time the papers come in.

Q. What time do they come in?

A. Well, they come in after 12 and after 5.

Q. Every day?

A. To my knowledge; yes, sir.

By Mr. Bundy:

Q. What does he do with them when he brings them in?

The above question is objected to as leading, the court overrules the objection.

A. He don't bring them in all the time.

Q. When he does bring them in, what does he do with them?

A. Well, I am very seldom there at the time they are brought in.

Q. Well, when he sees them—what does he do with them when you are there?

A. He gives them to the receiver.

Q. Some times he gives them to Woellner, some times to you, is that correct?

A. It is.

Q. And you simply put them in a box and send them up stairs?

A. That is all I do.

Q. Under what name?

A. No name.

Q. Does he send them in the name of John Francis?

A. I never look at anything.

Q. They send them up; you don't know what they are or anything. Does he pay for them when he sends them in or does he run an account?

A. I could not say; he don't pay for them.

Q. He don't pay for them. Is there any name signed to them?

A. I can't see them.

Q. Why can't you see it?

A. I never look at them at all. I just send them up without looking at them.

Q. Are they in cipher or long-hand?

A. I could not say. I never seen them.

Q. Do you send other messages up stairs without looking at them, all other messages?

A. Well, I do a whole lot. These telephone confirmation copies, I get from different customers, you know, I send them up the pipe without looking at them.

Q. That means that there is some special arrangement in regard to this class of telegrams, does it not?

A. Well, I could not state; there might be and there might not be. I don't know anything about any arrangement.

Q. Who gave you instructions to send them up stairs without looking at them?

A. No, sir; I seen the other receivers do it. I just followed their course.

Q. What other receivers did you see doing it?

A. Mr. McClure.

Q. Who else?

A. Mr. Woellner.

Q. Who else?

A. That is all.

Q. Why didn't you look at those telegrams when they were brought in there—were they sealed up?

A. I never looked at them at all.

Q. Why not?

A. I never do.

Q. Why don't you?

A. I never have looked.

Q. How long did you say you have been employed there?

A. I have been in the telegraph business for the last ten years.

Q. How long have you been employed at the receiving desk?

A. Oh, about 3 years.

Q. Did you have any instructions as to how you should testify before you came on the stand?

A. None.

Q. In this case?

A. No, sir.

Q. Did you talk with the manager of the company or with the assistant manager or anybody else?

A. The manager didn't say anything to me at all.

Q. Well, who did say anything to you?

A. Well, Mr. Woellner told me to tell what I knowed if they asked me to—to come right out with the truth: that is what he said to me.

Q. Why did you say then on your direct examination that Francis never handed you any papers of any kind, and never handed anybody else any that you saw in that office, if you were told to tell the truth?

A. Some times he handed them and some times he didn't.

Q. Is that the only explanation you have to make?

A. Well the only explanation I have got—I am not used to being in the court room, or anything like that.

Cross-Examination.

By Mr. Shay:

Q. Have you any distinct recollection of this man ever handing you a telegram?

A. I have not—not a telegram—not of any telegrams.

Q. Do you recall of him having telegraphed with reference to the birth of his child to his brother in Chicago?

A. No, sir; I do not. I don't remember anything like that.

Q. How many offices is there in your building?

A. How many offices?

Q. On what floor?

A. Well, there is the railroad offices, you know; there is the Empire line; the Big Four have an office; a couple of freight offices, you know; the West Shore—not the West Shore, but the Empire, W. S. Morrill, all three or four right there together.

Q. As many as 5 or 6, is there not?

A. Yes, sir.

Q. All on the same floor?

A. Yes, sir.

Q. The same entrance?

A. Yes, sir.

Q. And nothing separating except your counter?

A. Only the counter.

Q. You have been there for how long?

A. I have been receiver there for three years.

C. H. Woellner, being recalled, testifies as follows:

By the Court:

Q. Mr. Woellner, when you were on the stand last, I understood you to say, in substance, at least I am not undertaking to repeat your language, that the defend-

ant, Francis, never handed you or brought in messages or papers to the office?

A. You understood me to say that he never brought—why, the question was put, I think, "does he bring" by the district attorney, I said, "No, sir, he does not."

Q. Were you drawing fine points upon questions asked you—were you withholding any truth?

A. No, sir.

Q. That you ought to tell to this jury?

A. No, sir.

Q. Well, now, I ask you whether this man Francis brought papers there that you received—whether he handed them to you or not?

A. He did, yes, sir,

Q. What did you do with them?

A. I sent them up stairs.

Q. Where up stairs?

A. Through the dummy pipe which goes into the operating room.

Q. Through the dummy pipe which goes into the operating room?

A. Yes, sir.

Q. Under whose direction did you do this?

A. Under the manager's direction.

Q. They went into the operating room to be sent out by the operator?

A. Yes, sir.

Counsel for the defendants move the court to rule out so much of the testimony of the witness as was in answer to interrogatories by the court, the court overrules the motion, to which ruling of the court counsel for the defendants at the time excepted.

By Mr. Bundy:

Q. You say this was done under the instructions of the manager—who is the manager that gave those instructions?

A. Mr. Page is the manager.

Q. Who gave the instructions?

A. All the instructions came from him; through him, or whoever has charge of his work when he is not there.

Q. Did he give you instructions as to this particular class of telegrams brought in by Mr. Francis?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court counsel for the defendants at the time excepted.

A. Did he give me instructions?

Q. With reference to this class of telegram—brought by Francis?

A. I can only say that he must have, because if I remember correctly, it dates back several years. All instructions coming from him necessarily must have come from the manager.

Q. These telegrams were brought in generally twice a day, were they not?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court, counsel for the defendants at the time excepted.

A. To my knowledge once.

Q. How were they signed?

A. They were enclosed in an envelope, which was sealed and not opened by me.

Cross Examination.

By Mr. Shay:

Q. Whether it was telegrams or what it was you don't know?

A. I assume they were, because that is what business we are in.

Q. But you don't know?

A. I didn't see them.

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Charles E. Page, being recalled by the government, testifies as follows:

By Col. Bundy:

Q. You are local manager, I believe, I understood of the Western Union Telegraph Company?

A. Yes, sir.

Q. Is Mr. Woellner under your orders?

A. Yes, sir.

Q. And directions—and the other receiving clerks likewise?

A. Well, Mr. Cromback and Miss Madden and Mr. McClure; these are the receiving clerks.

Q. Now, Mr. Page, it developes that Mr. Francis, one of the defendants in this case, has gone generally twice a day to the Western Union Telegraph Office in this city and delivered certain papers, which the receiving clerks sent up stairs in the chute for transmission without reading, that those messages are charged for; will you please tell us in whose name the account is kept therefor?

(The above question is objected to.)

Q. That these papers so delivered to the receiving clerks were not paid for in cash at the time?

The Court:

I think the question is objectionable in form. Bring Mr. Page's attention directly to the matter about which you want him to testify without assumptions which this question contains.

Q. Mr. Page, are there any messages delivered to the Western Union Telegraph Company in this city, at about the hours of noon and 5 o'clock generally daily for transmission, which are charged to an account and not paid for at the time?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court counsel for the defendants at the time excepted.

A. Messages are being filed with us at all hours of the day.

The Court: Confine yourself to these hours.

A. 12 and 5, you say?

Q. Yes, certain messages, delivered generally at 12 and 5 o'clock?

A. Which are not charged for?

Q. Which are not paid for in cash, but are charged?

A. Yes, sir, such messages are delivered to us.

Q. By whom?

A. I could not answer that question—by various parties; there is scarcely a minute in the day but what some one is at our counter filing these telegrams of all characters. I never see them myself.

The Court: Ask him directly with reference to the defendant, Francis.

Q. Do you know who pays for the telegrams, or in whose name the account is kept that are sent by the defendant, Francis, through your office?

A. I do not. I testified yesterday, I think, that I never met this man, and I do not now recollect of ever meeting him.

The Court:

Call his attention to the testimony of the two receivers directly, and ask him what he knows about that and what instructions he gave—what was done with those messages that are sent up the chute.

Q. Now, as to certain papers that are sent up the chute in the Western Union Telegraph Office, under your

directions at about 5 o'clock and 12 o'clock every day by the receivers, what is done with those?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court counsel for the defendants at the time excepted.

A. Any messages that are sent up?

Q. I want to know about these. You know what I wish to know about, Mr. Page.

The Court:

You may ask him directly what you want to know.

Q. Aren't there policy messages sent through the office of the Western Union Telegraph Company?

A. I have no personal knowledge that there is.

Q. Aren't there lottery messages sent through the office of the Western Union Telegraph Company?

A. I have no personal knowledge by seeing those messages or handling them that there is.

Q. Haven't you a business knowledge that those things are done?

(Above question objected to and overruled.)

A. You ask me if I have any business knowledge. It has been my understanding for years, in fact—

Q. Well, answer the question—don't give us your understanding. Answer that question. Have you any business knowledge that lottery messages are being filed with you?

A. That lottery messages are being filed with us, yes, I have.

Q. By whom in October, along about the 1st of October of last year?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court counsel for the defendants at the time excepted.

A. Well, I can't state definitely, because I never come in contact with them. I never handle them.

Q. Who does from your office—who makes these contracts with them?

A. There is no special contract to my knowledge with any lottery concern for handling their messages. They are handled just the same as we handle any business for the general public.

Q. To whom did you charge these accounts in October of last year?

(Above question objected to.)

Q. The accounts for lottery messages which he says goes through the office?

The Court:

Bring his attention to these in question that come from Room 64.

Q. Do you know of any messages, lottery messages, that come from Room 64 of the St. Paul Building?

A. Not from my personal knowledge.

Q. Well, from your business knowledge as manager of that concern?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court counsel for the defendants at the time excepted.

A. From my business knowledge I do know what arrangement was made sometime ago, I don't know exactly the date, possibly within the last year, with the District Telegraph Company, connected with the Western Union, which is an independent corporation, that picks up and delivers Western Union telegrams—I do recollect now of an arrangement being made to bring in messages from the St. Paul Building; I can not say from this particular room that you specify, and why I recollect it is this, that the manager of the District Company, who is under my jurisdiction, spoke to me about a rate that these people wanted for bringing in messages, somewhat different from the regular rate that is generally made for that service, but I never saw any of their messages in all my connection with the telegraph company to my knowledge.

Counsel for the defendants move the court to rule out the above answer of the witness. The court withholds his ruling for the present.

Q. You are also the manager of the District Telegraph Company, are you not?

A. I am secretary and treasurer and general manager of that company, yes, sir.

Q. With whom was that contract made?

A. There was no written contract made to my knowledge.

Q. Very well, I don't care whether written or verbal?

A. Verbal arrangement was made with the chief clerk of that department, Mr. T. W. Timberlake.

Q. Who was the party at the other end of the line from the St. Paul building?

A. I can not answer that question definitely. Mr. Timberlake probably would know.

Q. Who pays the bills?

A. I can not answer that definitely.

Q. Are these messages that come in that way signed?

A. I never saw any of them, I could not answer that question.

Q. Do they pay by check or by cash?

A. I could not say that either.

Q. Who is the cashier of that concern?

A. Mr. Rector, F. L. Rector is the cashier of the District Company; he handles the funds.

Q. Now, Mr. Page, don't you know, as a matter of fact, that this man, John Francis, comes to the Western Union Telegraph Office, on the corner of Fourth and Vine Streets, generally twice a day, and delivers these messages himself, and that they are sent through your office?

A. I never saw him there delivering any messages, I naturally would not, because it don't come under my notice. I seldom ever pay any attention to anybody that is at the counter.

Q. You know what this case is about, don't you?

A. Only by hearsay. The first I knew anything about it is when I was subpoenaed yesterday.

Q. Do you know you are called upon to tell the truth, the whole truth and nothing but the truth?

A. I am perfectly willing to answer any questions that are put to me according to the best of my knowledge and belief, I am not here to evade any questions at all.

By the Court:

Q. Mr. Page, two of the receivers in the employ of your company testified that the defendant, Francis, has for some time been bringing papers, rather a package, a sealed package or sealed packages and delivering them to the receivers, who, under instructions from you as general manager, sent them up the chute to the operating room. I will ask you to tell the jury whether you know anything about that.

A. I can not say that this man Francis, because I do not recognize him; I have never had any business relations with him to my knowledge. I can not say that he has ever brought any packages there, but in a general way, without any personal knowledge whatsoever, I do know that such packages are being sent into our office; they are being sent to our operating department; I never saw one of these packages; I never saw anything contained in the packages; I only know in a general way that such messages are being brought in that are termed lottery messages.

Counsel for the defendants move the court to rule out the above answer. The court takes the motion under advisement.

By Col. Bundy:

Q. In whose names are these lottery messages sent, or to whom are they charged in your account?

(Above question objected to.)

A. I don't know in whose name they are sent, for I have never seen a message. How could I tell in whose name they are sent? I have testified repeatedly that I have never seen any of these messages, I am telling the truth.

Q. Will you find out in whose name they are and come back and tell us?

A. If the court will make such an order that will protect the Telegraph Company under our rules in such cases. I am perfectly willing to do anything the court directs.

The Witness: As I understand it, the court directs me to examine our files for any date in September or October?

The Court: From the 1st of October to the 6 of October, with a view to finding and ascertaining the names of persons by whom these messages are sent, if you have them, messages that come from the St. Paul Building in sealed packages and were taken by the receivers and sent up the chutes to the operating room without opening them. That information you can get. You can get the information from the receivers or from the operators.

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Charles Hirschman, being called by the government and sworn, testifies as follows:

By Mr. McPherson:

Q. Your name is what?

A. Charles Hirschman.

Q. What is your official position? Do you hold an office in city of Cincinnati?

A. Assistant Deputy Police Court Clerk.

Q. Have you the bond that was signed to release Peter Edgar from prison upon the 4th or 5th day of October, 1899?

A. I have.

Q. Will you produce it? (Witness produces bond.) Is that the original bond?

A. This is the original bond, yes, sir.

Q. Will you look at the bond and state who signed it as bondsmen?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court counsel for the defendants at the time excepted.

A. C. W. Reilley.

Cross-Examination.

By Mr. Shay:

Q. Mr. Hirschman, were you present at the time this bond was signed?

A. No, sir, I was not.

Q. Did you see Mr. Reilley sign this bond?

A. No, sir.

Q. Do you know that it was executed by Mr. Reilley?

A. Not to my knowledge.

Q. Are you acquainted with his signature?

A. I could not say that, no.

Q. Can you tell who witnessed this signature?

A. Mr. Menke made out the bond; J. B. Menke.

Q. Where is Mr. Menke now—is he around at the Police Building?

A. I don't know; I think he is; he ought to be there now.

Q. Will you go back and send him here?

A. Yes, sir.

(Upon application of counsel for the defendants the court rules out the above testimony of this witness.)

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F. S. Kyle, being called by the government and sworn, testifies as follows:

By Mr. McPherson:

Q. Where do you live, Mr. Kyle?

A. I live in Covington, Kentucky.

Q. Whereabouts in Covington?

A. Seventh and Garrard, 703.

Q. What is your business?

A. Printer.

Q. Where is your printing establishment?

A. 529 Madison Avenue.

Q. Covington?

A. Yes, sir.

Q. I will ask you if you have printed in the year 1899 what is known as official prints for lotteries?

The above question is objected to by counsel for the

defendants, the court overrules the objection, to which ruling of the court counsel for the defendants at the time excepted.

A. Not that I know of, no, sir.

Q. Did you ever print papers similar to that (showing witness Exhibit 3)?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court counsel for the defendants at the time excepted.

A. I never printed any that I know of myself, no, sir.

Q. Were they printed in your office?

A. I don't know whether these were printed in my office.

Q. Similar to that?

A. There might have been some similar, yes, sir.

Q. Well, state whether they were or not.

(Above question objected to.)

A. Well, I think they were, yes, sir.

Q. Who printed them?

A. I think a fellow by the name of Frazier.

Q. What is his first name?

A. John T.

Q. Is he present to-day here?

A. Yes, sir.

Q. In the witness room?

A. Yes, sir.

Q. Who was Mr. Frazier working for?

A. He was in partners with me, sir. I did the outside work.

Q. You and he were partners when these were printed?

A. Yes, sir; I think we were.

Q. How often did you print these?

A. I could not say, sir.

Q. Well, your best judgment—every day?

A. Well, I think it was every day for awhile, yes, sir.

Q. How are they printed?

A. Well, I could not say, Mr. Frazier attended to that and I attended to the outside.

Q. Who paid for them?

A. I don't know who paid for them.

Q. Does Frazier know?

A. I don't know whether he does or not.

Q. Who would know if you don't know or Frazier didn't know?

(Above question objected to.)

Q. Can you answer that?

A. No, sir; I could not.

Q. Would there anyone else in your employ have the right to receive payment for this work?

A. Yes, sir; they would.

Q. Who?

A. Nobody but Mr. Frazier would be.

Q. You or Frazier would be the ones that would be paid?

A. Yes, sir.

Q. Who besides you and Frazier would receive instructions of the numbers to print?

A. Nobody else.

Q. What time in the day would you receive instructions to print these numbers?

A. That I dont' know.

Q. Who does know?

A. I suppose the one who took charge of the inside, Mr. Frazier.

Q. Mr. Frazier?

A. Yes, sir.

Q. Where were they sent after they were printed?

A. That I could not say. They were called for I think.

Q. Who called for them?

A. I don't know, sir. There was different parties, I think.

Q. Do you know any of the parties?

A. I do not.

Q. What time in the day would they call?

A. That I don't know.

Q. Who would know? Would your partner know?

A. I suppose so.

Q. Do you know where they were delivered at all?

A. No, sir; I don't think they were delivered.

Q. I will ask you if you don't know as a matter of fact that they were delivered across the river to the place of business of Charles W. Reilley, a defendant here?

A. No, sir; I do not.

Q. I will ask you if you don't know that Mr. Frazier was not arrested with these papers upon him at one time?

A. I do, sir.

Q. When he was arrested he was taking them to Mr. Reilley's place of business, wasn't he?

A. That I don't know.

Q. Did you say that you know that Mr. Frazier was arrested with these papers upon his person at one time?

A. I do, sir.

Q. Then, he delivered them sometimes himself, did he?

A. He delivered them, yes, sir, I think.

Q. What do you mean by saying people called there for them?

A. There was people called there for them.

Q. Who?

A. I don't know who they were.

Q. How many times did people other than Frazier take them from your place of business?

A. I could not say, sir, because I don't know. I was not about the place enough to know at the time.

Q. Mr. Frazier was the one who generally delivered them then was he?

A. Yes, sir; that is, when he was arrested over here, I looked into the matter and inquired about the things—

(Objected to.)

Q. Who keeps the books?

A. I keep the books, sir.

Q. Who did you charge these to?

A. They was not charged to anybody, these was cash.

Q. When was it paid the cash, each day?

A. No, sir.

Q. When or how?

A. I think it was paid once a week.

Q. Did you keep an account of the printing from Monday until the end of the week when they were paid for?

A. Yes, sir; that was kept in the press room.

Q. Did you ever send a statement of account to anyone for this printing?

A. No, sir; I did not.

Q. Do you know who paid for this?

A. I do not know, sir.

Q. Do you know Charles W. Reilley?

A. No, sir; I do not. I don't think I would know him only by hearsay in the papers.

Q. Do you know of a man by the name of Richmond?

A. I know of him, yes, sir.

Q. Do you know him?

A. I do not. I am not personally acquainted with him.

Q. Do you know of a man by the name of Myers?

A. I do not. I know him by sight. I am not personally acquainted with him.

Q. Did either of these gentlemen ever call for them?

A. No, sir.

Q. Did either of these gentlemen pay for them to your knowledge?

A. No, sir.

Q. Do you know the defendant here, John Francis?

A. No, sir.

Q. Do you know the gentleman I mean, sitting to the left of Mr. Shay?

A. I don't know him.
Q. Did you ever see him before?
A. I don't think I did.
Counsel for the defendants moves the court to rule out the whole testimony of the above witness. The court withholds judgment for the present.

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J. G. Frazier, being called by the government and sworn, testifies as follows:

By Mr. McPherson:

Q. Where do you live?
A. 808 West 7th St.
Q. Where?
A. In this city.
Q. Cincinnati?
A. Yes, sir.
Q. What is your business?
A. Private detective.
Q. What was your business in '99?
A. The same as it is now.
Q. Were you in partnership with a man named Kyle in the printing business?
A. No, sir.
Q. Were you ever in partnership with him in the printing business?
A. No, sir.
Q. Did you ever work for him?
A. No, sir; I don't know him.
Q. Were you subpoenaed in this case?
A. Why, I was in court here this morning, they grabbed me and said I was a witness; I told them that I knowed nothing about the case, and they insisted that I did and I told them I didn't.

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J. T. Frazier, being called by the government and sworn, testified as follows:

By Mr. McPherson:

Q. Where do you live?
A. In Covington, Kentucky.
Q. What street number?
A. Well, at present, I don't know the street number there where I live.

Q. What is your business, Mr. Frazier?

A. Printer.

Q. What was your business in the year '99?

A. I was a printer at that time.

Q. Where do you work?

A. I work for the Kyle Printing Company.

Q. How long did you work for the Kyle Printing Company?

A. About to the best of my knowledge a year or a little over, probably not that.

Q. While you were working for the Kyle Printing Company, did you print each day a number of papers similar to that?

A. For a while, yes, sir.

(Showing witness Exhibit No. 3.)

Mr. Shay:

The same objection to each of these questions.

Q. For whom did you print them?

A. We didn't print them for any body in particular. The orders came in just the same as any other order of printing would come inside the place.

Q. Who gave you the order?

A. It was brought in by first one party then another.

Q. Who were they?

A. I don't know who they were at the time—I don't know their names.

Q. Where was it brought from?

A. From some place in Covington, I think; I don't know; I know nothing about that, of course, in a printing office that way probably we would have been a little bit better off if we would have asked more minutely about where these things come from, but then it is not the custom to ask such things as that, and the consequence is, I could not state exactly where these things came from.

Q. Did you ever ask where they came from?

A. No, sir.

Q. Who did you charge them to?

A. They were not charged to anybody?

Q. Who paid for them?

A. They were paid for when they were delivered on this side of the river.

Q. When they were delivered on this side of the river each day?

A. Yes, sir, each day.

Q. Who delivered them?

A. I delivered them.

Q. To whom did you deliver them?

A. I delivered them—I don't know the parties I delivered them to.

Q. Where did you deliver them?

A. Why, the principal part of the time they were delivered at—down here on Vine street—I think it is Pearl and Vine or Third and Vine. The principal part of the time.

Q. Where the other part of the time?

A. The other part of the time they were delivered on Sixth street.

Q. Whereabouts on 6th street?

A. Delivered in a saloon there on Sixth street.

Q. What number?

A. I don't know the number.

Q. Who paid you for them when they were delivered there on Sixth street?

A. The party that I delivered them to.

Q. Do you see the party in court?

A. No, sir; I do not.

Q. I will ask you if that is the gentleman that you delivered them to?

A. No, sir.

Q. Mr. Reilley?

A. No, sir; I never delivered them to him.

Q. Did you ever see him before?

A. I can't say that I ever seen him before—I have seen him before just about the same as I would see any of the rest of them.

Q. How do you mean about any of the rest of them?

A. Any people that I would deliver the things to; first one day they were delivered to one party, the next day they were delivered to another.

Q. Who were they delivered to then—do you know the names of any of them?

A. No, sir; I do not.

Q. How many times did you deliver them, Mr. Frazier?

A. I don't know exactly how many times. I probably delivered them—I could not say exactly. I may have delivered them 50 or 60 or 100 times.

The Court: To a different man every time you say?

A. Not always to a different man.

Q. Do you mean to say they would be paid for each time of delivery?

A. No, sir; they were paid for on Saturdays generally.

Q. Who paid for them?

A. The party that I gave them to on Saturday.

Q. Who would you give them to on Saturday?

A. Give them to the man that was generally in the accustomed place.

Q. Where was the accustomed place?

A. There on Sixth street or on Vine street.

Q. Whereabouts on Sixth street?

A. There in a saloon on Sixth.

Q. Whereabouts in a saloon on Sixth?

A. The saloon is between— let's see, it is between Walnut and Main or Vine and Main.

Q. Where is it with reference to Drury's Hotel from here?

A. I don't know where Drury's hotel is.

Q. 114 East Sixth street?

A. I don't know the numbers along there.

Q. Where is it with reference to the Times-Star building?

A. Right back of the Times-Star Building.

Q. You say where you delivered them was right back of the Times-Star building?

A. Yes, sir.

The Court: Fronting on Sixth street?

A. Yes, sir.

Q. The north side?

A. The north side of the street.

Q. The next building to the Times-Star?

A. I delivered them in a saloon generally.

Q. Was it the next building to the Times-Star?

A. Yes, sir; the next building to the Times-Star.

Mr. McPherson:

Q. Don't you know that is Reilley's place?

A. No, sir; I don't know whose place it is.

Q. Did you ever see him in there?

A. No, sir; I never seen him in there.

Q. You never delivered these papers to him?

A. No, sir; I never did.

Q. He never paid you for them?

A. He never paid me for them.

Q. Describe the man whom you did deliver them to?

A. Well, I don't know as I could give you any description of him; you see this has been a year or so ago.

Q. You seen him every day and every week?

A. I didn't see him every day. I didn't see the same party every day.

Q. Describe the first party you gave them to upon Saturday here next to the Times-Star building?

A. The fellow I gave it to there to the best of my knowledge was a short fellow that wore a light suit. I don't know how you would describe him—light complected.

Q. What did they call him?

A. That is another one I don't know.

Q. Did you ever hear his name?

A. No, sir; I never heard his name.

Q. How did you speak to him when you would go in?

A. I didn't speak to him at all; I just seen him—I knowed him; they knew me.

Q. How would you know who to deliver them to?

A. I delivered them to the party that asked me for them.

Q. How would he ask you for them?

A. When I would go up there, he would walk up and ask me for those things.

Q. Did you have a telephone in your building over in Covington, in the printing office?

A. No, sir.

Q. Who made the arrangement first to print these tickets?

A. I don't know who did.

Q. Did you make the arrangement?

A. No, sir.

Q. With whom was it made?

A. I don't know who the first arrangement was made with.

Q. Did you have a partner in that business?

A. Yes, sir.

Q. Who was that partner?

A. Mr. Kyle.

Q. Did Mr. Kyle ever receive payment for these?

A. I don't think he did. I know he did not.

Q. Did he make the arrangement to print them?

A. No, sir.

Q. Who did?

A. There was a printing office bought at the time and that printing office over there was doing this work, and we just followed up what they were doing; that was all, only it has changed hands and changed location; at that time we just continued their line of work just the same as they did.

Q. About what time of day did you get notice to print the numbers?

A. Sometimes about 11 o'clock and sometimes later than that; they didn't come in at any regulation time. There was no regular time that I know of anything about. I know we didn't have any regulation time for that at all; of course it was between, always between 11 and 12 o'clock, but as far as stating a specified time, I could not do that.

Q. Always within an hour?

A. Yes, sir.

Q. Then in the evening you would get the numbers to print again?

A. Yes, sir; then between 4 and 5.

Q. Who would bring these numbers to your office?

A. First one person then another.

Q. How many different persons were there?

A. I don't know, there was a dozen or more, as far as that part was concerned.

Q. How were they brought to your office?

A. Just simply a slip of paper with some numbers on it, that was all.

Q. Can you describe to the jury the appearance of the person that brought them to your office?

A. I could not do that very well either for the simple reason of the different people or parties that brought them there; sometimes he was a big man and sometimes a little man and things of that kind.

Q. When he was a big man, describe the big man?

A. When we first got them a heavy set fellow brought them in there.

Q. Describe his appearance to the jury?

A. I don't know. You would have to give me an outline, I am not a very capable hand at that business.

Q. Did he have a full beard?

A. No, sir; he had no beard at all.

Q. Smooth face?

A. Smooth face.

Q. How tall was he?

A. I guess he was about—he must have been 5 feet or a little over, or something of the kind.

Q. Five feet?

A. Yes, sir.

Q. Rather small man was he—how old was he?

A. He was about my size. I guess he was about probably 35 years old.

Q. What was the color of his hair?

A. His hair was light.

Q. Did you ever see him at any other place or time than when he delivered these numbers to you?

A. I seen him around some saloons over there in Covington different times.

Q. Did you learn his name?

A. No, sir.

Q. Did you ever try to find out his name?

A. No, I never tried to find out his name.

Q. Did you ever hear anyone call him by name—his first name?

A. No, sir.

Q. Did you know the first or last name of any of the people that brought these numbers to you for printing?

A. No, sir, I did not.

Q. Or to whom you delivered them?

A. No, sir.

By the Court:

Q. During what time were you dealing with them?

A. I don't know—I can't—I don't remember exactly when the time was.

Q. Well, about what length of time?

A. Well, probably about 5 or 6—4 to 5 months, something in that neighborhood.

Q. How often would you see them?

A. Well, I would say, sometimes maybe I would see one party 3 or 4 days, maybe I would not see him—

Q. Once or twice a day?

A. Sometimes once a day. Maybe one party once then somebody else afterwards.

Q. How many different persons?

A. I don't know. To the best of my recollection there must have been a dozen or more at least, if not more than that.

By Mr. McPherson:

Q. I understood you to say these were printed twice a day, in the morning between 11 and 12 and in the afternoon between 4 and 5?

A. Yes, sir.

Q. And were delivered across the river here each day in the morning and evening?

A. They was not delivered across the river each day in the morning; sometimes they came over there and got them; the same party that would bring the slip would come back and get them.

Q. You didn't deliver them every time?

A. Not every time, no, sir.

Q. How much of the time did you deliver them?

A. I delivered them, probably, I don't know exactly how often—it may have been 3 months, it may have been less or more.

Q. At the time you delivered them you delivered them twice a day?

A. I delivered them twice a day, yes, sir, a good deal of the time.

Cross-Examination.

By Mr. Shay:

Q. You say you ceased printing papers like unto these about a year ago?

A. I didn't say. I say it was a year or more ago that this business—that I ceased to have anything to do with this business—that was it, a year or more ago.

By Mr. Shay:

I renew my motion as to all of the questions and answers of this witness, that they may be ruled out.

The Court:

Before the case is concluded, I will rule on this testimony and the testimony of the preceding witness.

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J. B. Menke, being called by the government and sworn, testifies as follows:

By Mr. McPherson:

Q. Your business is what?

A. I am one of the deputy clerks of the Police Court.

Q. That is your signature to this bond?

A. That is my signature.

Q. Can you state the gentleman who made that signature—did you see him make it?

A. I did.

Q. Do you know the gentleman?

A. I do.

Q. Could you recognize him in this court room?

A. Yes, sir.

Q. Is that the gentleman (pointing at Reilley)?

A. It is.

Said bond is offered in evidence by counsel for the government and marked Exhibit No. 17. Said bond is here attached.

Counsel for the defendants object to the receiving of said bond in evidence, the court overrules the objection, to which ruling of the court counsel for the defendant at the time excepted.

Cross-Examination.

By Mr. Shay:

Q. Did you see Mr. Reilley sign that bond?

A. Of course there are so many bonds signed there that I possibly might not be able to testify that I remem-

ber that he signed that particular bond.

Q. The question I asked you is, did you see him sign it—have you any recollection now that you saw him sign it?

A. I can not say that I did.

Q. Are you acquainted with his signature?

A. I am.

By Mr. McPherson:

Q. Is that his signature?

A. That is his signature.

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William E. Bundy, being called by the government and sworn, testifies as follows:

By Mr. McPherson:

Q. You are the District Attorney for the Southern District of Ohio?

A. Yes, sir.

Q. Did you present this case to the grand jury, Mr. Bundy?

A. Yes, sir, most of it.

Q. I will have you these exhibits found in this paper and ask from whom you received them and when?

A. I received them from Sergeant Clawson, a police officer in the grand jury room on the day that the indictment was returned.

Q. In whose possession have they been since that time until this?

A. I put them in the safe in the District Attorney's office, and they have been there until they were brought into this court room.

Q. That is the only one that has been introduced in evidence, and this, you received that from whom and when?

The Court:

What are these papers? What exhibits?

Mr. McPherson:

These are Exhibits 6, 7, 8, 9 and 10.

A. I don't recall from whom I did receive this Exhibit No. 5, but I received it from someone at that time and put it in this envelope. That is my handwriting marked "Lottery Cases," and together with the other envelope it was placed in the safe, but from whom I re-

ceived it, I don't know. It might have been Mr. Pelton or it might have been the sergeant or Mr. Harrison.

Cross-Examination.

By Mr. Shay:

(No cross-examination.)

Counsel for the defendants move the court to rule out the testimony of the above witness, the court overrules the objection, to which ruling of the court counsel for the defendants at the time excepted.

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A. L. France, being recalled by the government, testifies as follows:

Mr. McPherson:

Q. Mr. France, you stated in your examination on yesterday that you were familiar with the way lotteries were conducted—policy—I wish you would take these exhibits, Exhibits 5, 6, 7, 8, 9 and 10, and explain to the jury what they are. First start with Exhibit 8 and explain it—what did that purport to be?

(Above question objected to.)

Q. Do you know whether policy was played in October, '99, the same as it was when you were in the business?

A. No, sir, I know nothing about that date.

Q. You know nothing about that date. Well, what kind of tickets or slips were used when you were in the business?

(Above question objected to.)

Q. Calling your attention to the ticket you have in your hands; were such tickets as that used when you were in the business?

A. Yes, sir, that was the usual form of ticket.

The above question and answer objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court counsel for the defendants at the time excepted.

Q. What does that purport to be?

A. That would purport to me to be two 4 numbered rows and number 75 played in what they call day number, that is, the number to come out by itself without any combination. I see at the bottom of it "Kentucky." I don't know what that means, whether 1st or 12—I don't understand that.

Q. As far as the player is concerned, what does that represent to the player?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court counsel for the defendants at the time excepted.

A. That would represent his ticket to the player. A memorandum of the numbers that he had played.

Q. What was the ticket good for to the player?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court counsel for the defendants at the time excepted.

A. Why, this simply is, I say, a memorandum of his play. If those numbers are drawn from the wheel, are the successful ones, this may be a winning ticket, and it may not be; it may be worth something; it may have no value at all.

Q. Showing you Exhibit 9, what is that?

A. Similar to the one I just had, only this consists of five four numbered rows, played in what I would consider the Kentucky Lottery, "Ky." at the bottom for 5 cents.

Q. Those tickets are issued when, before or after the drawing?

A. Before.

Q. Showing you Exhibit 7?

A. Similar to the one I just spoke of; there is five four numbered rows, played in the Kentucky Lottery.

Q. Showing you Exhibit 10?

A. Exhibit 10 shows to me that there are two five numbered rows and day number 75, played in Kentucky Lottery.

Q. Showing you Exhibit 6?

A. One five hundred row in the Kentucky Lottery.

By the Court:

Q. I observe, Mr. France, that the amount paid differs, what is the significance of the difference?

A. The difference is in this, sir, very often in making plays they either put the amount or their rating. What I mean by that, the amount that they will win, which shows the amount.

Q. I can not hear a word.

A. Very often, sir, in making up the book, some vendors will leave out the amount entirely and put the rate in. For instance, they pay 200 for 1, if you play 1 or 3 numbers, they may put it $200; the office would know that the play was nothing but one dollar.

Q. Sometimes it is 5 cents?

A. It may be 5 cents, 20 cents or 15 cents.

Q. What is the difference?

A. The different amounts played on those numbers; for instance, five numbers constitute what we call in lottery parlance 10 gigs, a gig is three numbers; there are combinations of ten three numbers in a five numbered row. If you would place 10 cents on five numbers, that would be one cent a gig, and they pay in that proportion according to the 3 numbers out. That is, they pay 200 for 1. If you would play 10 cents on five numbers, and you win three numbers of those, would be entitled to $2 pay, 200 for one. Either amount of money carried out on the ticket of vendor's book, or rating, as we call it, is the same. It indicates how much money they are entitled to pay in the office.

Q. The winning is in proportion to the investment, and the character of the investment?

A. Entirely, and the character of the investment.

Q. What is the element of chance involved in the play of policy?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court counsel for the defendants at the time excepted.

A. There is a calculation made, but I have really forgotten it, Mr. McPherson; I don't remember what it is. I think there is one chance in—I have forgotten whether 3 or 4 thousand, or 6 or 7 thousand. I have really forgotten.

Q. One chance in 6 or 7 thousand ordinarily?

A. That is in 3 numbers out of 78. I think 78 numbers make over seven thousand combinations of three numbers. Of course, you have that number of chances against you in getting three numbers out of 78. That is my recollection. I have forgotten, though, just the calculation.

Q. I hand you now a book, Mr. France, tell the jury what that book is.

The above question is objected to by counsel for the defendants, the cout overrules the objection, to which ruling of the court, counsel for the defendants at the time excepted.

A. I should call that a check book.

Q. For what?

A. Used for sending, transmitting, making out and sending drawings by telegraph, lottery drawings.

Q. Did you ever see that book before?

A. Yes, sir.

Q. Where did you see it?

A. I picked this book up off of the table in the room in the St. Paul Building when a raid was made there one afternoon.

Q. When?

A. By Lieut. Poppe, I have forgotten the date.

Q. In '98?

A. When the raid was made by Lieut. Poppe, yes, sir.

Q. You picked that book up?

A. Yes, sir.

Q. Do you remember the number of the room?

A. I remember it was spoken of as Room 64. I didn't notice upon the door or anything of the kind what was the number of the room.

Q. When you were in the business, Mr. France, in the St. Paul Building, under what name did you have your room rented?

The above question is objected to by counsel for the defendants, the court overruled the objection, to which ruling of the court counsel for the defendants at the time excepted.

A. That room, I don't think it was 64; I think it was on a lower floor, in that building rented.

Q. The question is, who composed this firm—what is the name of the firm?

A. W. C. Francis, Jr. & Co.

Q. I ask first, who is W. C. Francis, Jr.?

A. W. C. Francis, Jr. is a son of W. C. Francis, one of the principal owners, the former owners of the Kentucky State Lottery.

Q. What connection had W. C. Francis, Jr., with the drawing of these lotteries in Cincinnati, if you know?

(Above question objected to and sustained.)

Counsel for the government offer said check book heretofore referred to, in evidence, which book is hereto attached and marked Exhibit No. 19.

Counsel for the defendants object to the offering and receiving of said check book in evidence; overruled; defendants except.

Cross-Examination.

By Mr. Shay:

Q. If I understood you correctly in answer to the District Attorney, you said that at the raid that was made in the building, St. Paul Building, upon Room No. 64, in the month of May, '98, you found this book?

A. Yes, sir.

Q. You picked it up yourself?
A. Yes, sir.
Q. Where has it been ever since?
A. I don't know, sir.
Q. Who did you give it to?
A. My memory is I handed it either to Mr. Pelton or Mr. Poppe.
Q. Whether it has been back there since May, '98, you don't know?
A. I know nothing more about it.

The Court:

The papers that are submitted to me by Mr. Page will be admissible if properly identified, and the District Attorney can have an opportunity of examining them in the hands of General Cowen, in whose custody they are, until they are either offered in evidence or returned to Mr. Page. Then the District Attorney can determine whether he has the means of identification that will justify their admission.

By Mr. Shay:

Q. Now, Mr. France, if I understand you correctly, you say you don't know what the mode of doing business has been with the lottery company or policy people for the past four years?
A. No, sir, I know nothing about it.
Q. A paper or memorandum, as I understand you, is made out by the person who plays himelf?
A. Sometimes and sometimes by the vendor.
Q. Sometimes by him and sometimes by the vendor?
A. Yes, sir.
Q. The vendor, you say, makes a book in which he records the play and this paper—it is the book upon which the money is paid, is it?
A. No.
Q. And the play that is made?
A. I don't just understand you. The money simply covers the payment for the ticket or for the amount invested in the play, and it is recorded upon the book.
Q. The play is recorded upon the book that is kept by the vendor?
A. Yes, sir.
Q. And this is kept by the man as a memorandum to refresh him of the numbers that he plays. Now, then, if he never played them why, it has no value?
A. No.
Q. If it never was recorded in the book or the money

never paid, there would be no bet made?

A. No, sir.

Q. You speak about the matter of chance in a lottery where there are 78 numbers in the wheel. Are you speaking with reference to what somebody has told you or have you made a mathematical calculation on the subject of chance yourself?

A. No, I think I expressed myself to the jury, that I have forgotten pretty nearly all about it; I said I didn't know whether it was 3 or 4 thousand, or 6 or 7 thousand. I know it is quite a large number.

Q. But you never calculated yourself?

A. Oh, I have years ago, but I have forgotten all about it. I had all those things in my mind at one time, but I have forgotten.

Q. These tickets or papers or figures might mean somebody may have written them down as to what he intended to play?

A. Oh, certainly, I know nothing about that.

Q. You don't know anything about that?

A. No.

Q. There is no evidence to your mind that they were ever played?

A. Nothing more than that is the usual form of making a ticket of that kind when it was played.

Q. Sometimes the individual does it himself?

A. He could make a memorandum and stick it in his pocket and never play it.

By Mr. McPherson:

Q. Where no book is made, where the tickets when they are played are not recorded in a book to be sent over the river, but where the original ticket is sent over to headquarters to be counted, then these tickets are the only evidence of the play, are they not?

A. In our method of doing business, we have never received anything of that kind as a play, but come in in books that were made out by the vendors. Upon those books the company paid their money out.

The Court:

I don't think counsel understand the witness. The witness is describing the method in use when he was in business 4 years ago. He is not undertaking to say what the method is to-day.

Q. I will ask you now, where there was no book made —I am not asking what was done in his time or any other time—where no book was made, where the only evidence

of the play was these tickets, and they were sent to headquarters instead of the book, if you please, then these tickets would be the only evidence of the play—would they or not?

The above question is objected to by counsel for the defendants.

Q. In your answer to Mr. Shay, I understood you to say these tickets were of no value, after they were recorded in the book?

A. No, I did not, sir.

Q. What did you say?

A. I said because a person would write a book and put in their record in a book, it would be of no value; and one could sit down and write any of these slips of paper with numbers on it, and it would be of no value.

Q. But if these tickets are written and they are turned into the vendor, with the amount of money accompanying them to make a bet, then they are of some value?

A. They have an element of chance.

By Mr. Shay:

Q. If he is a vendor and turns his book in?

A. Unquestionably.

Q. You are now speaking of the method when you were in business?

A. Yes, sir.

Q. If he did not turn it in it is of no value?

A. It naturally would not be of any value if there was nothing turned in.

Counsel for the defendants move the court to rule out the whole testimony of the above witness, the court overrules the motion, to which ruling of the court counsel for the defendants, at the time, excepted.

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John M. Price, being called by the government and sworn, testifies as follows:

By Mr. McPherson:

Q. Where do you live, Mr. Price?

A. 614 York street, Newport, Ky.

Q. How long have you lived in Kentucky?

A. Born and raised there.

Q. What street do you live on?

A. York street.

Q. What is your business, Mr. Price?

A. Machinist.

Q. Where are you employed at the present time?
A. ———— Third and Plum.
Q. Cincinnati, Ohio?
A. Cincinnati, Ohio.
Q. Do you know Mr. Harrison?
A. Yes, sir.
Q. His initials are William P.?
A. H. T.
Q. Do you know Mr. Pelton?
A. Yes, sir.
Q. What were you doing in October, '99, particularly from the 1st to the 6th of that year?
A. I was working for Mr. Harrison.
Q. Working how?
A. Working on policy cases.
Q. By whom were you employed?
A. Well, I was employed by nobody exactly—with Mr. Harrison.
Q. Are you acquainted with John Hoff—Anthony Hoff?
A. Yes, sir.
Q. Where is Anthony Hoff's place of business?
A. In Newport, on Saratoga street. I don't exactly know the number.
Q. Are you acquainted with John Edgar?
A. No, sir; only what I hear that is his name; that's all I know.
Q. Do you know the gentleman sitting immediately back of Mr. Shay?
A. Yes, sir.
Q. Have you seen him before?
A. Yes, sir.
Q. Did you see him on or about from the first to the sixth of October, 1899?
A. I believe I did, yes, sir.
Q. How long were you connected with Mr. Harrison in working upon these policy cases?
A. I think it was about a year off and on.
Q. When did you begin and when did you quit?
A. It was in November, November last.
Q. That you quit?
A. Yes, sir.
Q. When did you begin—a year previous to that time?
A. As near as I can recollect, I think.
Q. Were you with Mr. Harrison at Mr. Hoff's place of business on the 2nd, 3rd, and 4th of October, '99?
A. I think I was, yes, sir.
Q. Well, do you know whether you were or not?

A. I don't know whether it was that date, but I know I was there, yes, sir.

Q. You may describe what, if anything, was done or occurred in your presence while in his place of business upon the 2nd, 3rd and 4th?

A. I seen Mr. Harrison make two plays there.

Q. What days?

A. I could not tell you.

Q. Were you present upon the day that John Edgar was arrested by the Cincinnati police?

A. Yes, sir.

Q. Do you know the date—what month that was?

A. No, sir; I could not tell.

Q. If you were informed that was the 4th of October, '99, now, can you tell what time that was in relation to the 4th of October that Mr. Harrison made these plays?

A. No, sir, I could not. I could not positively tell. My memory is kind of short on that.

Q. We will begin with the 4th of October, were you at Mr. Hoff's place of business upon that day?

(Above question objected to.)

Q. The day that John Edgar was arrested by the Cincinnati police were you in Anthony Hoff's place of business that morning?

A. I think I was, yes, sir.

Q. State what, if anything, you seen there that morning or saw done there?

A. I just seen Mr. Harrison make a play.

Q. What did you see him do?

A. I seen him give Mr. Hoff a paper with numbers on.

Q. What else?

A. And he took it and put it in a drawer.

Q. What else did he give him besides the paper, if anything?

A. Money, I don't know just how much it was now, sure. I am not positive in that—I am not positive how much money he gave him.

Q. You mean you are not positive of the amount?

A. Of the amount, no, sir.

Q. What did Mr. Anthony Hoff do with it?

A. Put it in the drawer.

Q. What occurred after that?

A. Well, after that Mr. Harrison went over the river and I stayed in Newport.

Q. What did you do?

A. I followed Mr. Edgar across.

Q. Where did you first see Mr. Edgar that morning?

A. I think I seen him going in Hoff's barber shop.

Q. Was that before or after this play was made?
A. After the play.
Q. Where were you when he went into this barber shop?
A. I was about a half block below.
Q. What were you doing?
A. Watching for him to come.
Q. Watching for who to come?
A. Edgar.
Q. State to the jury just what you did?
A. Well, I just followed him when he come out of there across the bridge and seen him arrested. That's all I done.
Q. After he came out of Anthony Hoff's place of business, describe to the jury where he went?
A. He went right down over the Central.
Q. Anthony Hoff's place of business is where?
A. On Saratoga street.
Q. Whereabouts on Saratoga street?
A. Between 5th and 6th.
Q. Describe the streets he went down to the jury and where he went exactly?
A. I am not positive now what he went down, but he went down York street and went over the bridge.
Q. Did he stop at any other place?
A. No, sir.
Q. After he left Anthony Hoff's place of business?
A. No, sir; not to my knowledge.
Q. Did he converse with any one?
A. No, sir.
Q. Did he meet anyone that he stopped and talked with?
A. No, sir.
Q. Where did he go?
A. He went across Central bridge.
Q. How close were you to him all this time?
A. I was about 2 blocks away from him.
Q. Was he any time out of your sight?
A. Only when he was arrested, that is all.
Q. Well, until he was arrested?
A. Well, until he crossed the bridge.
Q. Was he at any time out of your sight until he crossed the bridge.
A. No, sir.
Q. And until he was arrested by the police?
A. No, sir.
Q. What did you do after he was arrested, if anything?
A. I just walked about town, that is all.

Q. Where was Mr. Edgar taken if you know?

A. I don't know, but I think he was taken to the Hammond Street station, I think.

Q. Did you go with the police and Mr. Edgar any place?

A. No, sir.

Q. That was the day Mr. Edgar was arrested? What did you do the day previous to that?

A. Well, I can't remember now, it has been so long.

The Court: Lift up your voice.

A. I say I can't remember what I done the day previous before that, it has been so long.

Q. Were you at Anthony Hoff's place the day previous to that?

A. Yes, I think I was.

Q. Can you tell what occurred there, if anything, that day?

A. I think there was a play made that day, but I am not quite positive it has been so long now, my memory has kind of forgot these things. I have been so busy working lately.

Q. The day previous to the 3rd, do you remember what you did that day?

(Objected to, overruled, and exception.)

Q. The second day before the arrest what did you do?

A. I think we was over watching Hoff's place.

Q. Was anything else done there that day?

A. Not as I can remember now.

Q. What did you do there that day—what did you see?

A. I didn't see nothing only Edgar come and go, that is all.

Q. Well, did you see that?

A. Yes, sir.

Q. Where did he go to?

A. Well, I don't know; I didn't follow him.

Cross-examination:

By Mr. Shay:

Q. Mr. Price, what is your business?

A. Machinist.

Q. Was it Mr. Harrison that employed you?

A. Yes, sir.

Q. How much did he give you?

A. Well, I didn't receive much.

Q. Well, how much?

A. He didn't pay me. Mr. Pelton paid me.

Q. Mr. Pelton paid you?

A. Yes, sir.

Q. How much did he pay you?

A. Well, some days a dollar and some days a half dollar.

Q. How much in all?

A. Well, I could not tell exactly.

Q. How many days did you work?

A. I can't tell that.

Q. Why was the difference made between say a dollar one day and a half the next?

A. Well, I could not tell you that.

Q. Didn't he give you any reason for making a difference in the pay?

A. Well, the collections was coming in poor he says.

Q. The collections that he was collecting?

A. Yes, sir.

Q. They were coming in poor. Well, did you get as much as $10 in all?

A. All while I was working for him?

Q. Yes?

A. Oh, I got more than that, I guess, yes.

Q. How much more than that?

A. I can't state for I never kept no accounts; I didn't pay no attention much.

Q. Some days you didn't get anything?

A. Some days I didn't yes, sir.

Q. Did you get $50?

A. No, I can't positively state that. I could not positively state that.

Q. How many days did you work watching?

A. I could tell you that.

Q. Did you watch any place else besides Hoff's?

A. Yes, wherever I was sent by Mr. Harrison.

Q. You were sent by Mr. Harrison?

A. I got orders off of him.

Q. How many days did you watch Hoff's place?

A. Well, now, I could not positively say that.

Q. Two days before or a day before you saw this arrest of Edgar, were you watching the place?

A. It might have been a week, maybe, I don't know, I could not positively state.

Q. During that time did you ever see anybody go in that shop?

A. One man.

Q. One man?

A. Yes, sir.

Q. Who was that?

A. I think his name was Stocemeister.

Q. How far were you away?
A. About a half block.
Q. About a half block?
A. Yes, sir.
Q. Did you see whether he got shaved or not?
A. No, sir; I did not.
Q. You don't know what he done in there?
A. No, sir; I do not.
Q. Was that the only man that you saw in all the days that you watched go in except Edgar?
A. The only man to my knowledge.
Q. The only man to your knowledge?
A. Yes, sir.
Q. How many hours would you watch a day?
A. Several hours, I suppose.
Q. Each day?
A. Yes, sir.
Q. And he kept a barber shop?
A. Yes, sir.
Q. You say on this day of the arrest you saw Harrison and Hoff have some dealings?
A. I just seen him give him a play, that is all.
Q. Did you see him write any numbers?
A. Who, Harrison?
Q. Yes, sir?
A. No, sir.
Q. Was there anything on the paper that he gave him?
A. There was numbers on it, but I could not state what the numbers was.
Q. How do you know that?
A. I seen it.
Q. You seen it?
A. Yes, sir.
Q. You don't know how much money he gave him?
A. Well, I am not positively sure, but I think it was a quarter, I don't know, I would not say for sure.
Q. How close to them were you?
A. I was about a foot or two away from him.
Q. About a foot or two away from him?
A. Yes, sir.
Q. What did he say to Hoff?
A. He says "here is a play," that's all.
Q. What did Hoff say to that?
A. He didn't say nothing, he put it in the drawer that is all.
Q. You didn't hear Hoff tell him, he didn't keep any policy shop, didn't you?

A. I can't recollect that now.

Q. Do you know whether he said he kept a policy shop or not?

A. He didn't say that, no, sir.

Q. Didn't he tell you that he didn't keep a policy shop?

A. I am not sure of that now.

Q. Don't you know whether he told you that or not?

A. I can't recollect.

Q. He may have told you that?

A. He may have, yes, sir.

Q. What did Hoff do with it?

A. He put it in the drawer, that's all.

Q. Didn't he say anything in regard to it?

A. Not as I can remember.

Q. What did he do with the money?

A. Put it in the drawer.

Q. Did he have any book there or paper to write down on?

A. I don't know.

Q. You could have seen whether he had or not, could you not?

A. It looked like a book; he didn't write nothing, though.

Q. He just threw this paper in the drawer?

A. That is all.

Q. Did you see Mr. Harrison when he wrote it out?

A. No, sir.

Q. Did you see what he took it from or where he took it from?

A. He took it from his vest pocket if I ain't mistaken, as near as I can recollect.

Q. Then where did he go?

A. When, the day of the arrest?

Q. Yes, right after this, what did you do?

A. Well, I went about a half block below and watched the barber shop.

Q. How long did you remain there?

A. I think about a half an hour, I think.

Q. What time in the morning did you go in?

A. I could not state that positively what time that was.

Q. Did you ever get shaved in this shop?

A. Yes, sir.

Q. How often?

A. If I ain't mistaken, twice, as near as I can recollect.

Q. Did you sit down and read a paper in the shop?

A. Yes, sir.

Q. All the time with a view of noticing whether any body else played policy there, was it?

A. No, sir.

Q. How?

A. No, sir.

Q. That was your business there, was it not?

A. I just went in.

Q. Wasn't it your business to see if anybody played policy there?

A. Yes, sir.

Q. And you didn't see anybody play policy?

A. No, sir.

Q. Only Mr. Harrison?

A. I only seen Mr. Harrison play, that's all.

Q. Well, you had played policy, hadn't you?

A. In Hoff's?

Q. Oh, anywhere?

A. I think I did, several times; yes, sir.

Q. Yes, you did several times, but you never played here?

A. Where, at Hoff's?

Q. Yes?

A. No, sir.

Q. You never talked with Hoff about the subject of policy, did you?

A. Not as I recollect.

Q. Can't you recollect whether you ever asked him whether he wrote policy or not?

A. I can't recollect that; no, sir.

Q. Well, did you ever go into the shop except the two occasions when you got shaved?

A. Not as I recollect.

Q. On either occasion did you see anybody come in there or play policy?

A. No, sir; only Harrison, that's all.

Q. Now, what hour was it that morning that you came there?

A. Well, I could not positively state that; it has been so long that I can not remember.

Q. Would you approximate the time then as a half hour that you were waiting on the outside?

A. I judge more than that.

Q. It might have been an hour?

A. Yes, sir. I just judge that.

Q. What hour in the day was it, morning?

A. In the morning.

Q. How early in the morning?

A. I could not tell you that, because I carried no time piece.

Q. Was it as early as 9 or 10 o'clock?

A. I think it was something about that, as near as I can recollect. I am not positive what time it was.

Q. How long had it been that you were out of employment before you accepted this?

A. Oh, I have been out, off and on, a year, off and on.

Q. Off and on for a year. Had you any previous acquaintance with Harrison?

A. I have known him before, yes, sir; I just met him on the streets—met him on the streets and got acquainted with him. That is all I know of him.

Q. That is all you know of him?

A. Yes, sir.

Q. In that way he came to employ you?

A. Yes, sir.

By Mr. McPherson:

Q. Do you know the defendant there, John Francis?

A. I don't know him only what I was told his name was.

Q. Have you seen him previous to this time?

A. I have seen him off and on, just pointed out to me.

Q. Where have you seen him?

A. I seen him on Fourth street?

Q. What have you been doing when you seen him on Fourth street?

A. I was told to watch and see what he does.

Q. Did you watch him?

A. Yes, sir.

Q. How many times did you watch him?

A. I can't exactly tell.

Q. A good many or few?

A. A few times.

Q. Well, how many approximately?

A. I would not state on oath how many times I did watch him.

Q. Fifty times?

A. Not that many times.

Q. When you watched him what did you see him do?

A. I seen him come out of the St. Paul building and go to the telegraph office.

Q. What did you see him do at the telegraph office?

A. I seen him go in and come out.

Q. While he was in there did you see him do anything?

A. No, sir; no, sir.

Q. About what time did he go to the telegraph office?

A. I think it was about 12 o'clock. You see I carried no watch—

Q. You were a deserter from the United States army, were you not?

A. I decline to answer that.

(Above question objected to.)

Q. Why do you decline to answer?

A. Well, I decline to answer upon that ground.

Q. What ground?

A. You can't incriminate me—it don't incriminate me, but I decline to answer it.

Q. Did Pelton promise you a situation if you would do this?

A. No, sir.

Q. Did Harrison?

A. No, sir.

Q. Did anybody else promise you a situation?

A. No, sir.

By Mr. McPherson:

Q. You failed to obey your subpoena; you were arrested and brought into this court under arrest to testify this morning were you not?

A. Yes, sir.

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William Fellows, being called by the government and sworn, testifies as follows:

By Col. Bundy:

Q. Mr. Fellows, what is your business?

A. Chief Operator of the Western Union Telegraph Company.

Q. Here at the Cincinnati office?

A. At Cincinnati; yes, sir; Fourth and Vine.

Q. How long have you had that position?

A. Oh, two years last November.

Q. I hand you a package of papers dated Cincinnati, October 2nd., 1899; I will ask you to state what those papers are, if you know?

A. I can't really state what they are. They come up—they were sent by us; further than that, I don't know.

Q. They were sent by the Western Union Telegraph Company?

A. Yes, sir. There is our marks on them.

Q. Do you know how they came to the operators?

A. They came up from the first floor of receiving room through what we call the dummy, up to the operating room where we have boys that take them out and distribute them to wherever the messages go—to the different points.

Q. Who opens the envelopes if they should happen to be sealed?

A. If they should happen to be sealed they would be opened by the boy that we have at what we call the dummy.

Q. Have you the same boy there that was there in October of last year?

A. We have the same boy in the office; they change around, first one boy and then another. We have 15 boys I think on the day force.

Q. Do you know what boy had charge of the dummy at the operating room in October of last year?

A. No, I don't; I could not state which one. The boy is in the employ of the company yet, but which one I could not say.

Q. About what hour in the day are these telegrams or dispatches of this sort sent out?

A. I see this first one is 12:10 P. M.

Q. Look at some of the others?

A. Here is one at 5:6 P. M. Noon and evening.

Q. During that period of time were many telegrams of this sort and general description sent out by the Western Union?

A. That I can't say, as I don't see the messages that are handled; I have assistants, and these boys, as I say, they take them out of the dummy; they distribute them—put them on the wires and they are there handled by the operators.

By the Court:

Q. What are your duties there?

A. My duties are to oversee the office and keep the time of the operators; it is a kind of general overseer. If there is any delay to the business or anything of that kind the assistants report to me and I notify the receiving room, if there should happen to be any delay to the business. But as for seeing the messages, it is very seldom I do, although I walk around the office and look to see that everybody is busy.

By Col. Bundy:

Q. Mr. Fellows, do you know where Mr. Timberlake is?

A. Mr. Timberlake, I think he is over to his office at Fourth and Vine, O. M. & T. Co.

Q. Did you ever see any of these telegrams come up the chute or dummy?

A. No; I never have seen any come up.

Q. Is it or is it not unusual that seventy telegrams in cipher, and of this description, should come up at certain hours, for transmission each day?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court, counsel for the defendants at the time excepted.

A. No, it is not unusual for that quantity of messages to come up at one time. Some times we have as high as 75 or 100 come up at once.

The Court: In cipher?

A. Well, that I could not say. That was the question that was asked me.

By Col. Bundy:

Q. Is it or is it not unusual that seventy telegrams in cipher, and of this description, should come up at certain hours, for transmission each day—every day?

(The same objection, ruling and exception as above.)

A. Well, I could not say because I am not stationed at the dummy; I do not see the messages coming up, and half of our business is cipher.

Q. Don't you know as a matter of fact that these are policy telegrams?

A. No; I do not.

(Above question and answer objected to. Exception.)

Q. Can you find the boy that was at the dummy, in the operators' room last October, the 2nd of October?

A. Yes, sir; I could find the boy that was employed, and probably can find the boy that was at the dummy at the time.

Q. Could you send him immediately?

A. Yes; I can send him here in a short time.

Q. Will you do so?

A. Yes, sir.

Q. Did you ever see the envelopes or enclosures in which these telegrams came up stairs as they came up the dummy?

A. No, I have not; the boy probably, if they come up that way, just takes them and tears the envelope up, I should judge so, and puts it in the waste basket.

The Court.

Are these telegrams that have been shown to you, in cipher—look at that package?

A. Yes, sir; that is what we call cipher. We can not get the meaning of that. I could not or nobody in our employ could tell what that meant.

Q. Where are they sent?

A. Here is one addressed to Detroit, Michigan, going to Detroit Michigan.

By Mr. Shay:

To each of these questions propounded by the court, we reserve an exception.

By the Court:

You may tell where each of those telegrams addressed—I mean the place to which they were sent?

A. Why, the one to Detroit, Michigan, is sent direct to Detroit from the marks. From what we call our operators' marks.

Mr. Shay:

Each question objected to and exception.

A. One going to Boston, our service marks indicate that was sent to New York as a relay for Boston, Boston, Boston, Boston Boston; this is one addressed to Indianapolis, Indiana, Indianapolis, Indianapolis, Chicago, Chicago, Chicago, Chicago, Chicago, New Haven, Connecticut; Roslyn, Va., Roslyn, Va., Providence, Rhode Island, Providence Rhode Island, Providence Rhode Island, Allegheny, Pa., Philadelphia, Philadelphia, Springfield, Ohio, Hamilton, Ohio, Dayton, Ohio, Columbus, Ohio, Columbus, Ohio, Cleveland, Ohio, Cleveland, Ohio, Cleveland, Albany, New York, Rochester, New York, Syracuse, New York, Alton, Pennsylvania, Camden, New Jersey, Hartford, Connecticut, Albany, New York, Rochester, New York, Alton, Penn., Camden, New Jersey, Hartford, Conn., Albany, N. Y., Rochester, N. Y., Syracuse, N. Y., Alton, Penn., Alton, Penn., Camden, New Jersey, Hartford, Conn., Albany New York, Rochester, New York, Syracuse, New York, Alton, Penn., Alton, Penn., Hartford, Conn., New York City, New York City, New York City, New York City, Buffalo, N. Y., Buffalo, N. Y., Buffalo, N. Y.

By the Court:

Q. What time in the day were they sent out?

A. This one to Albany, Rochester, and Syracuse and Alton, Penn., Camden, New Jersey and Hartford, Connecticut, was sent out at 5:20 P. M., and another one the same address sent out 5:12 P. M., New York City 5:08 P. M.; New York City 12:08 P. M., noon.

Q. Noon?

A. Yes, sir; New York City 12:11 P. M.; New York City 5:11 P. M.; Buffalo, New York, 5:06 P. M.; Buffalo, New York, 12:08 P. M.; Buffalo, New York, 12:06 P. M.

By Mr. McPherson:

Q. Will you look and see if all that you are examining are the same date?

The Court:

These are October 2nd?

The witness: October 5th; this whole pile is.

By the Court:

Q. Are these all of October 5th or different dates?

A. (After examination) All October 5th.

By Mr. McPherson: I will ask to have the same identification made upon this package.

The Court:

He can examine them elsewhere and be recalled to the stand. If he is able to state without going through them one by one, he can do so, if not, let him make the examination off the stand and be recalled.

The witness may take these telegrams and examine them for the purpose of ascertaining the dates, the places to which sent and the time of day. Telegrams other than those he has gone through while here on the stand.

Counsel for the defendants move the court to rule out the testimony of the above witness, the court overrules the motion, to which ruling of the court, counsel for the defendants at the time excepted.

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H. T. Harrison, being recalled by the government, testifies as follows:

By Mr. McPherson:

Q. You may state directly to the point the number of times you have shadowed this gentleman and watched

him come from the St Paul building and go to the Western Union Telegraph Co.?

A. I could not state the number of times; a great many times.

Q. Approximate?

A. Well, perhaps 20.

Q. When he would go in the Western Union Telegraph office what did you see him do in there?

A. Well, he approached the receiver's desk, but I never saw him give any papers; he evidently made a pass—

(Above answer objected to).

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Morris Krombeck, being recalled by the government, testifies as follows:

By Col. Bundy:

Q. I understood you yesterday that the packages left by the defendant, Mr. Francis, that you sent up the elevator, dummy elevator, to the operating room were always in a sealed envelope?

A. Well, all the packages that I sent were in a sealed envelope, yes sir.

Q. Describe that envelope?

A. Well, it is an envelope about that long (indicating), a Western Union envelope.

Q. What color?

A. Yellow, sort of light yellow.

Q. About the color of this (showing witness an envelope)?

A. Yes, sir; but not an envelope like that.

Q. I say the color of that?

A. Yes, sir.

Q. Always come in the same kind of envelope?

A. Always did as far as I seen.

Q. And they were sent up to the operating room in that envelope?

A. Up to the operating room; yes, sir, in that envelope.

Q. Did you ever see one of these envelopes opened?

A. I never did.

Cross-Examination.

By Mr. Shay:

Q. Did I understand you to say that this defendant ever handed you an envelope?

A. Well, not to my knowledge. I don't remember of him handing me an envelope at all, but he sent them up all right.

Q. Well, did you ever see him hand anybody else an envelope, in the last year?

A. I can't remember.

Q. Now, then, if I understand your testimony correctly then is, the envelopes that somebody handed in there, were sent by you up the chute, is it?

A. Well, whenever I handled them I sent them up.

Q. But what was in the envelopes you don't know?

A. I don't know, no, sir.

Q. Well, was there quite a number throughout the day of messages of that kind in envelopes that would come up the chute?

A. There was some in confirmation envelopes, as I stated yesterday, customers you know, come in like, for instance Proctor & Gamble, their boys would telephone their messages and the next day they would send them to us in an envelope, they would say, for telephone confirmation. I would never open that envelope.

Q. There was quite a number of messages came in sealed envelopes that way?

A. They averaged about 3 or 4 different firms a day, you know, that came that way.

By Mr. McPherson:

Q. Was there any writing upon these envelopes, these particular ones?

A. I never noticed any.

Q. It didn't say upon them, confirmation telegrams by telephone?

A. I never noticed it. Sometimes they would be in blank, sometimes they would be stamped, for confirmation only.

Q. You never noticed an address upon these envelopes of any kind?

A. I never did.

---

William Fellows, being recalled by the government, testifies as follows:

By Mr. McPherson:

Q. Mr. Fellows, have you made an examination of all the papers that you hold in your hands?

A. Yes, sir, I have examined October 2d, 3d, 4th and 6th.

Q. '99?

A. '99.

Q. Are you able to state now at what hours during the day, during each day, these telegrams were sent out, or about what hours?

A. From the marks they were all sent out between 12 and 6; from 12 to 12:20 and from 5 to 5:15, 5:20.

Q. Were they sent practically to the same places as those you have already described that were transmitted October 5th, '99?

A. Practically the same places, yes, sir.

Q. Are they of the same character of telegrams in cipher?

(The above question objected to.)

The Court: The witness should be asked what they are, as far as he is able to tell.

A. As far as I can see they are all ciphers.

Q. Do you know where they came from?

A. No, I do not.

Q. What is the name of the boy that was on duty at the chute in the operating room at the time these telegrams came up?

A. I can't state positively; I have sent for a boy, Philip Emig, that has charge of the dummy, as we call it, the chute.

Q. Will he be here immediately?

A. They said he would be here in a few minutes.

By Mr. Shay: We renew our motion to rule out all that testimony, motion overruled. If your honor please, and reserve our exception.

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A. L. France, being recalled by the government, testifies as follows:

By Mr. McPherson:

Q. You were present at the raid at the St. Paul Building you stated in '98?

A. Yes, sir.

Q. Who did you see there that day?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court, counsel for the defendants at the time excepted.

A. I saw Mr. Holland, Mr. Ben. Holland, R. B. Spencer, Henry Myers and this gentleman sitting by Mr. Shay.

Q. Who is Ben Holland?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court, counsel for the defendants at the time excepted.

A. Mr. Holland was a clerk employed by the Lottery Company.

Q. What Lottery Company?

A. The Kentucky.

Q. Who is Mr. Spencer?

(The same objection, ruling and exception.)

A. Mr. Spencer was—he came from New York City, here.

Q. Tell who Mr. Spencer is?

A. R. B. Spencer was sent here from New York City to represent a firm by the name of Shipley & Co., who are outside backers in the policy business. They would take the numbers that are drawn here and pay a monthly royalty to the Lottery Company for that privilage, and he represented them at these drawings to see that they were fairly conducted in their interest so they could not be defrauded.

Q. Who is Mr. Myers?

A. He represents a policy business in Cincinnati separate and distinct from the other firm, that he himself has an interest in, and his presence there was to protect his interest.

Counsel for the government state to the court that the last part of above answer of the witness, in which the witness says "his presence there was to protect his interest" may be stricken out from the answer. Counsel for the defendants object to the striking out of said part of said answer.

Q. Now, Mr. Francis, I will hand you telegrams, what is purporting to be telegrams, sent by the Western Union Company, of date of October 2d 3d, 4th 5th, and 6th. I will hand you those of October 4th. You may take these telegrams and examine them and explain to the jury what they are, if you know?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court, counsel for the defendants at the time excepted.

A. Had I better explain these one at a time. I expect one would explain them all.

Q. Take your own way?

A. From the general appearance of this document, I should say that it was a lottery drawing, in my opinion, made out in cipher form, to be transmitted through the

telegraph office to different points in the United States where the lottery company have agents. I arrive at that conclusion from the general make up of the dispatch; it is the usual form in which we always made them up, and also from the fact that I find in this dispatch there are 12 numbers, 12 names and 2 additional names, making 14 altogether, which would indicate to me that it was a morning drawing of 12 numbers drawn out and 2 names that indicate the check word which are derived from the adding up of the drawn numbers of the lottery and what are called false numbers that are placed on the other side from which they get these two last check words to decipher that message when it is received at the other end of the line.

That one consists of the same 12 numbers and two check words.

By Mr. Shay: What one is that?

A. October 4th. This one has 15 names, which would indicate that there were 13 drawn numbers and two check words, as described.

Q. What would that indicate, morning or afternoon drawing?

A. In the afternoon, as I explained to the jury, there are 13 numbers drawn from the wheel and in the morning 12; in addition to that there are two names at the bottom of this dispatch, that would possibly indicate to my mind the system that we had frequently used, and it was to protect one agent as against the other. A large number of agents, all having the same check books and the same keys to these check books to decipher the dispatches, would necessarily, if they wanted to, defraud one another; consequently they had a sepapate check and each one of these agents a separate key, so that they could not use any messages of this kind that they received as against one another.

Q. Right there I desire to call your attention, before proceeding further. State if telegrams sent to New York City the cipher was any material difference between those sent to other places?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court, counsel for the defendants at the time excepted.

A. Dispatches sent to New York City would differ only in this particular, that New York City was the headquarters of the Lottery Company, the proprietors and owners of these lotteries lived there, New York and Jersey City and their headquarters in New York, and

they had a private, separate check book themselves in addition to the other, and used the third check word that the other agents hadn't access to.

Q. Now, turn to the telegrams, if you can find them, from New York and see if they have the third check word on those?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court, counsel for the defendants at the time excepted.

A. You see 16 words to this New York Message. That would indicate to me that there were 13 drawn numbers and three check words to that New York dispatch, instead of two. In that New York dispatch there are 15, which would indicate to me that there were 12 drawn numbers and three check words, instead of two, as I explained to you, and the extra check for New York City.

Q. Explain the address if you can, upon those New York telegrams?

(Above question objected to.)

Q. As addressed here at the top of the telegram?

A. Yes, sir, I see here, New York City, Providence—

Q. Who gets that—how do they know to whom to deliver them from that address?

A. Oh, well now, I suppose the telegraph company at these points—I have never been there; whether they receive them at the telegraph office or anything about that, I don't know.

Q. Well, what I mean, how does the telegraph company know how to deliver that message, if you know?

A. I don't know how they deliver them.

Cross-Examination.

By Mr. Shay:

Q. This arrangement that you speak about with the man Spencer, how long ago was that arrangement made?

A. Oh, that was quite a number of years. I am speaking you know of what occurred during my time, Mr. Shay.

Q. About how long ago was that arrangement made?

A. I think when he first came out here from New York, sir, it must have been probably 12 or 15 years ago.

Q. 12 or 15 years ago?

A. Yes, sir.

Q. This man Myers, he had no connection with your institution or your lottery?

A. No, sir, Henry Myers, during my connection with the Kentucky lottery, represented Mr. Louis Davis, in-

terested in the business here in Cincinnati; after his death I understood Mr. Myers himself ran the business after Mr. Davis' death.

Q. With reference to these papers that you seek to interpret, do you know any word that is on there?

A. No, sir.

Q. You do not?

A. No, sir.

Q. You can't tell the meaning of any word or term that is employed there?

A. No, sir, I could not without a check book. I only speak in the sense of these telegrams being the usual form which we used years ago.

Q. Years ago you used a form like unto that?

A. Similar to that.

Q. Whether that is in use now or not, you don't know?

A. I don't know anything about that.

Q. Then the truth of the matter is, what these contain you don't know—whether it be a lottery message or not you don't know?

A. No, sir.

Mr. Shay: I ask to have the testimony of this witness ruled out in that regard.

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Philip Emig, being called by the government and sworn, testifies as follows:

By Col. Bundy:

Q. Where do you work?

A. The Western Union Telegraph Office.

Q. How long have you been employed by the Western Union Telegraph Company?

A. About 4 or 5 years.

Q. What are your duties there?

A. To check telegrams.

Q. To check telegrams?

A. Yes, sir.

Q. Where do you work at?

A. The 5th floor.

Q. What do you mean by checking telegrams?

A. Take a message from one hook and put it on another hook.

Q. What were your duties there in '99 in October?

A. I was working at the place they call the dummy.

Q. Describe that to the jury?

A. The place where the pipes come up.

Q. Come up from where?

A. From the first and fourth floor. You have to take a message out and put it on the hooks and the boys come up and take them away from that department.

Q. Do you remember along about in September and October, while you were there as dummy boy, you received a message or certain messages that came up in sealed envelopes, the envelopes being the Western Union Telegraph envelopes, you would open them about 12 o'clock and 5 o'clock in the afternoon?

A. I opened them at 12 but was not preser at 5.

Q. Describe to the jury how they would come up to you on to the fifth floor?

A. There would be 3 envelopes, two small ones, you know, in a third envelope; it was my duty to bust the envelopes open and put the message on the proper hooks.

Q. I will hand you telegrams of the 2d, 3d, 4th, 5th, and 6th, and ask you to look at these and say if these are telegrams—I will hand you the package of the fourth and ask you to look at those and see if these are packages that you took out of these envelopes and placed upon the hooks?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court, counsel for the defendants at the time excepted.

A. I have checked some of these.

Q. You have checked some of these?

A. Yes, sir.

Q. Was that the class and character of telegrams you would take out of these envelopes?

A. Yes, sir.

Mr. Shay: Exception.

Q. Can you identify those as being checked by you—some of them?

A. Some of them, yes, sir.

Q. Who checked the others?

A. I don't know, I was not present at 5 o'clock.

By the Court: Is there any mark upon the others that would indicate who did check them?

A. No, sir.

By Col. Bundy:

Q. State to the jury what ones there are that you checked?

A. 12 o'clock is the ones I checked.

Q. And they show that upon these telegrams?

A. Yes, sir.

Q. Your check mark?

A. No, sir, my check is not on them.

Q. How do you tell that you checked them?

A. I am not supposed to put my check marks upon telegrams like these.

Q. Why are you not supposed to put a check mark upon telegrams like that?

The above question is objected to by counsel for the defendants, the court overrules the objection, to which ruling of the court, counsel for the defendants at the time excepted.

A. These telegrams are supposed to be rushed. By putting our marks on them we delay them.

Q. What do you mean by "rushed"?

A. They are supposed to be put ahead of the rest of the business.

Cross-Examination.

By Mr. Shay:

Q. You say you put no mark upon these papers?

A. No, sir.

Q. All that you can say is that you handled telegrams of a similar character?

A. Yes, sir.

Q. Like unto them?

A. Yes, sir.

Q. But whether or not these are the telegrams you are unable to say?

A. These are the ones that I have handled.

Q. You have handled those?

A. Yes, sir.

Q. If you had no mark on them how do you know?

A. Because I was the only person who was supposed to handle these telegrams on that date.

Q. Because you were the only person supposed to handle them, then you think you must have handled them?

A. Yes, sir.

Q. Yet you are unable to identify any of these by any mark?

A. No, sir.

Q. Then it was because it was your ordinary run of business, and your habit to handle them that you presume that you handled them?

A. Yes, sir.

Q. Is there a number of messages come there, cipher messages, at the Western Union Office?

A. I don't understand what you mean.
Q. Cipher—you know what a cipher message is?
A. Yes, sir.
Q. Is there any number of cipher messages come?
A. Not that I know of outside of those.
Q. Not that you know of. How many boys were there employed there besides you?
A. 10 or 12 of them I believe.
Q. 10 or 12?
A. Yes, sir.
Q. Did they have the same duties to perform as you did?
A. Some of them used to help me with them.
Q. How many of them would help you?
A. One or two.

Counsel for the defendants move the court to rule out the testimony of the above witness, the court overrules the motion, to which ruling of the court, counsel for the defendants at the time excepted.

Counsel for the government offer the telegrams above referred to of October 4th, which are received in evidence and marked Exhibit 18, hereto attached. Counsel for the defendants object to the receiving of said exhibit 18 in evidence, the court overrules the objection, to which ruling of the court, counsel for the defendants at the time excepted.

And this was all the testimony offered by the government.

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After argument of counsel the court proceeded to charge the jury as follows, to wit:

Gentlemen of the Jury:

Congress, upon the second day of March, 1895, passed an Act, called the Anti-Lottery Act, which reads, so far as it concerns this case, as follows:

"Any person, who shall cause to be carried from one state to another, in the United States, any paper, certificate or instrument, purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of a lottery, or similar enterprise, offering prizes, dependent upon lot or chance, shall be punishable, &c."

Section 5440 of the Revised Statutes of the United States, declares that if two or more persons conspire to commit any offense against the United States, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty, &c.

The indictment in this case, in substance, charges that in this District, on the fourth day of October, 1899, the defendants, Charles W. Reilley, John Francis, Anthony Hoff and John Edgar, alias Peter Edgar, did unlawfully conspire to cause to be carried from the city of Newport, in the State of Kentucky, to the city of Cincinnati, in the State of Ohio, certain papers, purporting, as they well knew, to represent interests, dependent upon the event of a lottery, offering prizes, dependent upon chance, and that to effect the object of the conspiracy they did cause to be carried from the city of Newport, in the State of Kentucky, to the city of Cincinnati, in the State of Ohio, five papers, purporting, as they well knew, to represent the interest of H. T. Harrison and other persons in prizes or sums of money, which, by lot or chance, might thereafter be awarded to players in the next drawing of the lottery. Copies of the papers are set forth in the indictment.

It appears from the indictment that the lottery in question belongs to the variety known as "policy," and the scheme and manner of playing it is as follows: Of the numbers from 1 to 78, the players select such as they may choose, and upon the payment of a small sum of money these numbers so chosen are written on small pieces of paper in duplicate, either by the player or the agent of the lottery, who receives the money. One copy of these numbers is kept by the player and the other by the agent, and these papers represent the interest or chance which the player has taken in the drawing, which is afterwards to take place. The drawing consists in the selection by lot or chance of twelve of the numbers from 1 to 78, inclusive, and prizes, in varying amounts, are awarded to the players, whose choice of numbers are found in the twelve selected at the drawing. As, for instance, if one of the players should select the numbers 2, 26 and 78, and these are found among the twelve selected by chance at the drawing, the player is entitled to receive a prize or sum of money. Agencies for policy shops are established, where the players may make selections of numbers—make bets—and the paper or writing, evidencing the bet, held by the agent, is forwarded by a carrier to headquarters as it is called, before the drawing takes place, to enable those conducting the drawing to know what players have won and who are entitled to the prizes, or sums of money that are paid to the betters who win. After the drawing takes place, what are called official prints are made out, showing in one line the twelve winning numbers, in the order in which they

were drawn or selected, and in a line below, the same numbers in their numerical order. These official prints are forwarded to the policy shops or agencies for the information of the players. A man who has taken a chance wants to know the result of the drawing, and he is informed by the headquarters sending to these shops or agencies these so-called official prints, which show what the winning numbers are, and he can see whether his choice of numbers is among the winning numbers. The prizes or the sums won, are also delivered through these agencies to the successful players. The drawings are made twice a day, one at 12 o'clock noon and one at 5 o'clock in the afternoon.

Now, the government charges that these defendants conspired to cause the tickets, or evidences of the bet, set forth in the indictment, to be carried from the city of Newport, in the State of Kentucky, to the city of Cincinnati, in the State of Ohio, in time for the drawings, and that to effect the object of this conspiracy, the defendants did in fact cause these papers and tickets to be so carried.

In the first place, gentlemen, what, in law, constitutes a conspiracy? The Supreme Court of the United States has decided it as "A combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal, or unlawful, by criminal or unlawful means."

And, as I have said, the charge here is, that these defendants conspired, agreed together, to do a criminal act, to wit, to carry lottery tickets from one state into another, which is forbidden by the Act, which I have read in your hearing, and that in order to accomplish this undertaking, on their part, they actually did carry such tickets from the State of Kentucky over into the State of Ohio, because, under the Statutes of the United States, there must be not only a conspiracy, an agreement to do an unlawful or criminal act, but there must be some step taken in the execution of it, in the language of the Statute, "some act, by one or more of the conspirators, to effect the object of the conspiracy."

First, then, was there, about the time mentioned in the indictment, a combination of persons, engaged by concerted action, in carrying on a lottery, known as "policy," which offered prizes to its patrons, dependent upon lot or chance, and was it a part of the operation of the scheme to cause to be carried from the city of Newport, in the State of Kentucky, to the city of Cincinnati, in the State of Ohio, papers purporting to represent tick-

ets, chances, shares or interests in and dependent upon the drawing of the lottery thereafter to be made? Second, were these defendants parties to this combination? And, third, was any act done by one or more of the parties to the combination to effect the conspiracy?

In cases of conspiracy, it is seldom that what is called direct evidence can be adduced to establish its existence. Men who combine together to commit crime, do not publish the conspiracy to the world, nor put it in writing, or recite its terms in the presence of witnesses, and, therefore, it has been found necessary to resort to those facts and circumstances which attend the transaction, in order to ascertain whether such a conspiracy was formed and existed. There is no mystery about what is called circumstantial evidence. Your conduct and your action every day of your lives are influenced by the inferences which you draw from facts and circumstances that are presented to your minds in matters about which you are called to act. If A is charged with stealing a five dollar bill and B saw him steal it, and so testifies, that is direct evidence of the fact necessary to be found in order to convict him. But if a five dollar bill with a given number is missing and A is seen in the vicinity about that time, and he is afterwards arrested and accused of the theft, and denies it, and is then searched, and they find the bill in his pocket with the identical number upon it, the jury, in such a case, would be warranted in inferring that A took that five dollar bill, and that he took it with the mind of a thief, intending to appropriate it to his own use and deprive the owner of it. And these facts, the fact that the bill was missing, that A was found in the vicinity; that he was arrested; that he was charged with the theft; that he denied it; that he was searched and the bill was found upon him, are as satisfactory and conclusive as the statement of the witness who saw him take it. In one case, you have the direct evidence of an eye witness, in the other you have facts and circumstances, which justify and require you to infer that A was the guilty person.

In this case, therefore, the government has put before you many facts and circumstances, which it asks you to consider, and drawing from them the proper inferences, determine whether these defendants are or are not guilty of the offense with which they stand charged. You are to consider these facts and circumstances and determine whether a lottery was being carried on here, about the time stated in the indictment, which had, as one of its essential features, the carrying of lottery tickets from

Kentucky to Ohio? And if the evidence, the facts and circumstances put before you, satisfy you that such a lottery was being carried on, then you will turn to the same facts and circumstances, the facts and circumstances presented to you in the evidence, and determine whether these defendants were parties to a combination and conspiracy, engaged in carrying on that lottery with that inter-state feature. And I will say here in passing, gentlemen, that it is your function to determine what the facts in the case are, and it is the function of the court to determine what the law is. When you receive the law from the court and apply it to the facts, as you find them, you then determine, as the result of the application of the law to the facts, whether the defendants, or any of them, are guilty of the crime charged. The responsibility for the determination of the facts rests upon you, not upon the court, and in calling attention to the testimony in the case, the court does not do it with any purpose to influence your action, because you are under oath to perform your part of the duty here and are responsible for it.

Now, as to the defendant, Hoff. There is testimony which I will not undertake to recapitulate fully, but refer to in a general way, tending to show that he kept a barber shop in Newport, Kentucky; that Harrison, one of the witnesses for the government, called there on the 1st, 2nd, 3rd and 4th days of October and made bets. On the 4th—if I am mistaken about it the jury will correct me—on the 4th he took half of an envelope, and on the inside wrote down in duplicate his choice of numbers, tore it in two and kept one piece, containing the numbers that he had chosen, and gave the other piece to Hoff, containing the same numbers, and paid Hoff a sum of money; in other words, he made a bet or play, as he called it, in the lottery to be drawn that day; that shortly afterwards the defendant, Edgar, came to Hoff's shop and then started across the bridge to Ohio, and at the Ohio end of the bridge was arrested by officers of the Cincinnati Police Force and searched, and upon his person was found the ticket, the half of the piece of the envelope, containing the numbers chosen by Harrison, which had been left with Hoff, and four other pieces of paper containing numbers, and that Hoff was arrested the same day, I believe—you will remember about that—and that in his possession were found similar pieces of paper containing numbers, and copies of official prints and other papers which have been exhibited before you, and which you will have with you in the jury-room. And

upon these facts and circumstances, thus shown by the evidence offered by the government, the government claims that he was the agent of the lottery company; that he is what is called a vendor, an agent to receive bets and transmit them to headquarters in time for the drawing. Now, it is for you, upon this testimony, to say whether he was an agent for the lottery company for that purpose.

And upon the same evidence it is claimed that Edgar was a carrier for the lottery company. And it is claimed also upon this same testimony that these two men were in combination; that they were acting together; that one was receiving bets and the other, in playing his part, was coming there to get them and carry them over to headquarters. Now, it is for you upon this evidence, to say whether that is true or not.

As to the defendant, Reilley, there is evidence that he was in charge of a place on Sixth Street in this city, No. 116, I believe, and that Edgar was traced from Hoff's place in Kentucky across the bridge to this place on Sixth Street a number of times, and that at one time when the place was raided Reilley was found there with paraphernalia, which, it is claimed, belongs to the operation of a lottery, and (you will remember what was found there) official prints and papers of that character. I am not undertaking to repeat the testimony to you, because I depend upon you to remember it. And the government claims that he represented this end of the line, and that he was acting in concert with the other two. Now, it is for you to say what the fact is.

When a drawing has been made, the patrons are to be notified of the result of the drawing, and, it is said, that the drawings are conducted in the St. Paul Building, supervised by the defendant, Francis, and that he carried telegrams after the drawings to the telegraph office and sent the information to the players in different parts of the country. That is the claim of the government upon the evidence offered to show that he was in concert with the other three. Now, you must remember the evidence as to the defendant, Francis. It is for you to determine what his relation to the transaction was. If there was such a conspiracy, whether he was one of the parties to it? The evidence tended to show this, that he went to the telegraph office every day about 12 o'clock and about 5 o'clock, and it finally came out, through two of the receivers of the telegraph office, that he brought packages of some kind. Woellner and the next witness both testified that he did not hand them anything, but

when asked whether he brought anything there that came into their possession, as receivers of the company, whether he handed it to them or not, both witnesses, as I remember the testimony, testified that he did. And then, these witnesses, as I remember their testimony, said that the packages were sent up the tube to the operating room. You have the testimony of the little boy who attended the dummy or tube, as it was called, and received the matter that came up from below and opened it and put it upon the wires—distributed it upon the wires in front of the different operators who sent it out. Telegrams covering the time from the 1st or 2nd of October, I am not certain which, to the 6th, were introduced in evidence. Telegrams for one day were displayed before the jury. They were in cipher. No one has been able to tell the jury what the contents of these dispatches were, but you will remember what France, who was formerly engaged in this business, said about them —what the character of the telegrams was and their purpose. No witness has testified that Francis walked into the telegraph office and laid down on the counter a telegram and said "here is a lottery telegram that I am sending to New York to tell the people there the result of the drawing to-day"; nobody has testified to anything of that kind, but the government has put before you the facts and circumstances, to which I have alluded, and what these facts and circumstances show, you must determine, gentlemen, not the court. When you have recalled them, and have them in mind, then it is for you to say whether they show the connection of this defendant, Francis, with this alleged combination as claimed by the government. If they do, if you are satisfied from the facts and circumstances put in evidence, that these four men were connected with this combination, this alleged conspiracy, that they were working together, each playing his part, then the next step is to determine whether there was some act done in furtherance of the conspiracy. But, before passing to that, I should say to the jury, that in order to find these defendants parties to the conspiracy charged, the evidence must show that they knew what they were doing, they must have intended to carry on the lottery—they must have intended, in furtherance of the carrying on of the lottery, to carry tickets from Kentucky to Ohio. A man innocently drawn into a transaction of that kind, who plays a part without any knowledge of its purposes or objects, has no guilty intent that makes him a party. And, at this point, I will say, too, that it is not necessary that a man engaged in

such a combination should know every other man in the combination or the part he plays. If he knows there is a combination to do an unlawful act, to commit a crime, and that he has a part in it to play, and that there are others playing parts, and that others must play parts in order to accomplish the purposes of the conspiracy, he is as guilty as if he knew the name and had personal acquaintance with every one connected with the conspiracy—as if he knew precisely the part which every other man played. In a combination in which the co-operation of many members is necessary, covering a large field of territory, it would be impossible almost that each should know every other and the part he plays. It is only necessary that he should know there is a combination, of which he is a part, for the purpose of accomplishing a crime. If, then, there was such a conspiracy as the indictment charges, and if these defendants were parties to it, then the next question is, whether any act was done to effect it. But, before passing to that, there are some other matters I desire to call your attention to. Did these papers, or so-called lottery tickets, which it is alleged defendants conspired to carry from Kentucky to Ohio, purport to represent interests of players in a drawing afterwards to take place? It is not necessary, gentlemen, that they should purport or show upon their face that they were tickets in a lottery giving an interest to the holder, in a drawing afterwards to take place, but their purport may be shown outside of the papers. Now, as to the evidence offered by the government upon that point, you will recall the evidence of France, who was introduced as an expert, to tell what they were, and the evidence of Harrison, that he wrote out his ticket and delivered one-half of it to the agent, paid his money and held the duplicate—one of the duplicates, his evidence of the interest he had in the drawing that was to come off that day, and the evidence to which I have before referred as to the fact that the duplicate left with Hoff was afterwards found in possession of Edgar at the end of the bridge shortly after the play was made. If, from these facts you are satisfied that it represented an interest in the drawing afterwards to take place, then, within the meaning of the law, it purported to represent the interest of the player in the drawing, although it did not so state upon its face.

Now, then, to come to the act, which it is alleged was done in furtherance of this conspiracy. There is evidence to show that five tickets, copies of which are set forth in the indictment, were, in fact, carried across the

bridge from Newport, Kentucky, to Cincinnati, Ohio. That was an act to effect the purpose and object of the conspiracy. And, if the jury, upon this evidence, should find that Edgar was a party to the alleged conspiracy, and carried these tickets, including the Harrison ticket, over the bridge from Kentucky to Ohio, then I charge you that it would be an act in furtherance of the conspiracy, and it would be the act not only of Edgar, but of all the defendants; that is, if you find these four defendants were parties to the conspiracy charged in the indictment, to carry tickets across the bridge into Ohio, and that Edgar, one of them, did carry them over for the purposes of the lottery, in pursuance of that understanding among them, then his act was the act of all four—the act of all.

It is necessary, gentlemen, that it should be established by the government that the crime charged here was committed in this District; that is, in the county of Hamilton, and State of Ohio—in the Southern District of the State of Ohio, in the Sixth Judicial Circuit of the United States. I charge you as the law of the case that if you find that these men were parties to the conspiracy charged, and in furtherance of it, carried the tickets across the bridge into the state of Ohio, then you will be warranted in finding that the offense was committed in Hamilton county, State of Ohio, within the jurisdiction of this court.

When a man is charged with crime, gentlemen, and placed on trial, the presumption of law is that he is innocent, and before the jury would be warranted in finding him guilty of the charge, upon which he is tried, the prosecution must establish his guilt beyond a reasonable doubt.

I have recited in your hearing the elements constituting the charge in this case. Each element is essential to the charge. These elements of the charge must be established beyond a reasonable doubt, in order to warrant a conviction.

A reasonable doubt, as I have had occasion to tell you before, is just what the words imply, a reasonable doubt, not an unreasonable one. In the practical administration of justice, it is impossible to remove all doubt of the guilt of the accused; it would defeat the ends of justice to require anything of that kind. The law intends and it only requires that you should be satisfied beyond a reasonable doubt, not that you should be satisfied beyond all doubt. And the doubt which should be resolved in favor of the accused, is such a one as has reason for its founda-

tion, one that would cause you in a matter of importance to yourselves to pause and hesitate before acting. You would not pause or hesitate because some slight, trivial doubt entered your mind. Sometimes, I suppose, there is a temptation excited by sympathy to yield to doubt, to avoid the rendition of a disagreeable verdict. Gentlemen, that would not be a reasonable doubt, because the jury as part of the machinery for the administration of justice, should do its duty honestly without fear or favor. It ought not to shirk a clear duty because of suggested doubt that has not reason to support it.

Gentlemen, as I have told you many times, you are the sole judges of the credibility of the witness brought before you, and it is for you to determine what weight the evidence of any witness shall have in your consideration of the case. I have had occasion to direct your attention to the circumstances which jurors should take into account, and which men involuntarily take into the account, in passing upon the credibility of a witness, and in determining whether a given witness is worthy of belief, whether the story he tells is true, or whether it is true in part and false in part, and I do not feel that I need to spend time to repeat to you all the various circumstances which go to support or impeach the credibility of a witness. In passing on the testimony of a witness, you will consider his manner, his bearing, the story he tells, his intelligence, his prejudice, his disinterestedness, his honesty, his frankness, his disposition to be fair and other indescribable evidences of truth or falsehood, which every man sees and appreciates, and which, whether you realize it or not, enters into your mind notwithstanding, and controls your judgment in determining whether a witness is credible and what weight his testimony should have. A witness may be honest and truthful, and yet he may have a very defective memory, he may greatly lack in intelligence, and the weight that you will give to his testimony will not be such as you would give to that of an intelligent witness, with a clear, retentive memory. I am not making application, in anything that I am saying, to any witness in the case, I am simply discussing the matter in a general way to invite your attention to those circumstances which should be considered in determining the credibility of a witness and the weight which should be given to the story he tells.

The government must make out its case, and the fact that the defendants in this case have failed to testify, is not to be taken into the account against them. Without reference to whether they have testified or not, leaving

that entirely out of view, you are to take up the testimony which the government has introduced here and say whether it satisfies you with that certainty which the law requires that they are or are not guilty of the offense charged.

Accordingly as you find the facts, you may find all the defendants guilty, or you may find one or more guilty, and the others not guilty. Your verdict as to each will be determined by the facts as you find them. Each man's case is to be considered separately, and you are to find and determine whether they are all guilty, or whether they are all not guilty or whether some of them are guilty and some are not guilty, but it must appear that at least two persons conspired together. A man can not conspire with himself. There must be at least two.

Now, gentlemen, when you retire to your room, inquire, first, whether about the time charged in this indictment, in this district, there was a combination of persons carrying on a lottery, in violation of the Act of Congress, to which I have called your attention, by carrying lottery tickets from Kentucky to Ohio? And if you find there was no such combination of persons, acting together for such purpose, that will be the end of the case, and your verdict should be not guilty. But if you find there was such a combination of persons then let your next inquiry be as to whether these defendants, or any of them, were parties to that combination; were they taking part in it; were they playing parts in this unlawful combination, to carry lottery tickets from Kentucky to Ohio? If you find they were not, that is the end of the case. But if you find they were, then the next question is, did any one in carrying out the common purpose, carry any lottery tickets, as I have explained that term, from Kentucky to Ohio? If no one of them carried any tickets from Kentucky to Ohio, that is the end of the case and your verdict should be not guilty as to all of them. But if you find that one of them did carry tickets across the bridge from Kentucky into Ohio, having first found the other propositions to be true, then you will be warranted in returning a verdict of guilty as against all, or such of them as you find to be guilty.

Now, gentlemen, the court commits the case to your hands, satisfied that you will give it careful consideration and that your verdict when it is returned into court, will present the truth. A verdict that you will not only be satisfied with when it is rendered but satisfied with hereafter.

Counsel for the defendants except to that portion of

the charge as to what is sufficient venue; as to that portion of the charge as to what is a sufficient overt act; as to what in law constitutes a lottery ticket; as to all that portion of the charge as to what in law is sufficient to effect or accomplish the act of conspiracy; as to all that portion of the charge as to what would be sufficient on the part of the defendant, Hoff, to constitute him a co-conspirator; as to all that portion of the charge in relation to the defendant, Hoff, as to what would be sufficient in law to constitute him guilty of being one of the co-conspirators; also the same exception as to Edgar and as to Reilley and the defendant, Francis; also to that portion of the charge as to what constitutes a reasonable doubt; also the refusal of the court to give the special requests by defendant's counsel, and each of them; also to all that portion of the charge as to what constitutes a ticket and a violation of the Act of March 2nd, '95; to all that portion of the charge defining what constitutes conspiracy under Section 5440 R. S.; as to all that portion of the charge as to what is sufficient to constitute an overt act; also an exception to the papers sent in to the jury, all that were introduced in evidence.

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Whereupon the defendant, Charles W. Reilley filed his motion in writing to acquit, which same is clothed in the words and figures following, to wit:

Filed Mar. 14, 1900. Shay & Cogan, Attorneys for Defendant.

District Court, S. D. O., W. D.

The United States, Plaintiff,
vs.
Charles W. Reilley, Defendant.

No. 377.
Motion.

And now comes the defendant, Charles W. Reilley, and moves the court to direct the jury to acquit him:

1st. Because the said indictment does not charge an offense within the jurisdiction of this court.

2nd. Because the facts and statements contained in the indictment charge no crime against any valid law of the United States.

3rd. Because the said act of March 2, 1895, 3 Session,

53 Congress, p. 963, is an act not within the constitutional power of the Congress of the United States, in so far as therein contained, to wit: "That any person who shall cause to be carried from one state to another in the United States any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift, concert, or similar enterprise offering prizes dependent upon lot or chance," and is therefore illegal and void.

4th. Because there is no sufficient proof to support a conviction under any count in this indictment as against this defendant.

Shay & Cogan,
Attorneys for Defendant.

Which motion was overruled by the court, to all of which ruling of the court the said defendant, Charles W. Reilley, then and there excepted.

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And thereupon the defendant, John Francis, filed his motion in writing to acquit, which same is in the words and figures, following, to wit:

District Court, S. D. O., W. D.

The United States, Plaintiff,
vs. No. 377. Motion.
John Francis, Defendant.

And now comes the defendant, John Francis, and moves the court to direct the jury to acquit him:

1st. Because the said indictment does not charge an offense within the jurisdiction of this court.

2nd. Because the facts and statements contained in the indictment charge no crime against any valid law of the United States.

3rd. Because the said act of March 2, 1895, 3 Session, 53 Congress, p. 963, is an act not within the constitutional power of the Congress of the United States, in so far as therein contained, to wit: "That any person who shall cause to be carried from one state to another in the United States any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift, con-

cert, or similar enterprise offering prizes dependent upon lot or chance," and is therefore illegal and void.

4th. Because there is no sufficient proof to support a conviction under any count in this indictment as against this defendant.

Shay & Cogan,
Attorneys for Defendant.

Filed Mar. 14, 1900. Shay & Cogan, Attorneys for Defendant.

Which motion was overruled by the court, to all of which ruling of the court the said defendant, John Francis, then and there excepted.

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And thereupon came the defendant, Anthony Hoff, and filed in writing his motion to acquit, which same is in words and figures following, to wit:

District Court, S. D. O., W. D.

| | | |
|---|---|---|
| The United States, | Plaintiff, | No. 377. Motion. |
| vs. | | |
| Anthony Hoff, | Defendant. | |

And now comes the defendant, Anthony Hoff, and moves the court to direct the jury to acquit him:

1st. Because the said indictment does not charge an offense within the jurisdiction of this court.

2nd. Because the facts and statements contained in the indictment charge no crime against valid law of the United States.

3rd. Because the said act of March 2, 1895, 3 Session, 53 Congress, p. 963, is an act not within the constitutional power of the Congress of the United States, in so far as therein contained, to wit: "That any person who shall cause to be carried from one state to another in the United States any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift, concert, or similar enterprise offering prizes dependent upon lot or chance," and is therefore illegal and void.

4th. Because there is no sufficient proof to support a

conviction under any count in this indictment as against this defendant.

Shay & Cogan,
Attorneys for Defendant.

Filed Mar. 14, 1900. Shay & Cogan, Attorneys for Defendant.

Which motion was overruled by the court, to all of which ruling of the court the said defendant, Anthony Hoff, then and there excepted.

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And thereupon came the defendant, Peter Edgar, and filed in writing his motion to acquit, which same is clothed in the words and figures following, to wit:

District Court, S. D. O., W. D.

The United States, Plaintiff,
vs.
John Edgar, alias Peter Edgar, Defendant.
} Motion. No. 377.

And now comes the defendant, John Edgar, alias Peter Edgar, and moves the court to direct the jury to acquit him:

1st. Because the said indictment does not charge an offense within the jurisdiction of this court.

2nd. Because the facts and statements contained in the indictment charge no crime against valid law of the United States.

3rd. Because the said act of March 2, 1895, 3 Session, 53 Congress, p. 963, is an act not within the constitutional power of the Congress of the United States, in so far as therein contained, to wit: "That any person who shall cause to be carried from one state to another in the United States any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift, concert, or similar enterprise offering prizes dependent upon lot or chance," and is therefore illegal and void.

4th. Because there is no sufficient proof to support a conviction under any count in this indictment as against this defendant.

Shay & Cogan,
Attorneys for Defendant.

Filed Mar. 14, 1900. Shay & Cogan, Attorneys for Defendant.

Which motion was overruled by the court, to all of which ruling of the court the defendant, Peter Edgar, then and there excepted.

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And the defendants having asked before argument for special charges which same are as follows, to wit:

Before the defendants, or any of them, can be convicted under the indictment with which they stand charged the government must satisfy you beyond a reasonable doubt of two things, viz.:

First, that on or about the 4th day of October, 1899, in the county of Hamilton, and state of Ohio, and within the jurisdiction of this court, two or more of the defendants did then and there unlawfully, knowingly, and feloniously conspire together to commit an offense against the laws of the United States by conspiring to cause to be carried from Newport, in the state of Kentucky, to Cincinnati, in the state of Ohio, certain papers, certificates, and instruments purporting to be and to represent chances, shares and interests in prizes which by lot and chance might be awarded to persons who might select the numbers which by lot and chance should be included in the twelve numbers drawn and selected at the drawings of the so-called Kentucky lottery and the so-called Henry lottery or either of them, enterprises offering prizes dependent upon lot and chance or commonly known as policy and consisting in the drawing and selection by lot and chance at stated intervals of twelve of the numbers from one to seventy-eight, inclusive, and of awarding prizes in varying amounts to those who may have prior to the time of any one of the drawings and selections as aforesaid upon the payment of a small sum of money, select various combinations of numbers included in the said twelve numbers thereafter at said drawings drawn and selected by lot and chance as aforesaid; and

Second. That Charles W. Reilley, John Francis, Anthony Hoff and John Edgar, or either of them, to effect the object of such conspiracy, if you should find such conspiracy to have been entered into, at or about the time and place and for the purposes aforesaid, unlawfully, knowingly and feloniously cause to be carried from Newport, in the state of Kentucky, to Cincinnati, in the state of Ohio, papers, certificates or instruments representing

chances or interests in either of the lotteries aforesaid as alleged in this indictment.

I charge you that the papers, certificates or instruments, purporting to be or representing chances or interests in lotteries to which the indictment in this case refers must, in order to convict the defendants or either of them, be shown to have been papers, certificates or instruments in some drawing or drawings thereafter to take place, and not papers, certificates, or instruments in some drawing or drawings of either of said lotteries which had already taken place.

I further charge you that the conspiracy alleged in the indictment of conspiring to cause to be carried from one state to another, to wit, from Newport, in the state of Kentucky, to Cincinnati, in the state of Ohio, papers, certificates and instruments representing or purporting to represent chances, shares or interests in the said lottery must be shown to be for the purpose of disposing of such papers, certificates and instruments, and such purpose can not be inferred, must be proved, like any other fact, by testimony which shall so satisfy you beyond a reasonable doubt.

The failure of any of the defendants to take the stand in his own behalf must not be considered by you in the least degree as evidence of guilt, and you must not allow such fact to weigh in your judgment in determining the guilt or innocence of the defendants or either of them.

I charge you that the act under which the defendants stand indicted, in so far as it attempts to prohibit the carrying from one state to another of papers, certificates and instruments purporting to be or representing a ticket, chance, share or interest in or dependent upon the event of a lottery or similar enterprise offering prizes dependent upon lot or chance, is unconstitutional and void, and your verdict therefore must be for the defendants.

I charge you that any paper, certificate or instrument which purports to be or represents to be a ticket, chance, share or interest in or dependent upon the event of a lottery or similar enterprise offering prizes dependent upon lot or chance must be such paper, certificate or instrument as upon its face purports to entitle the holder thereof to a chance, share or interest in any so-called lottery or similar enterprise offering prizes dependent upon lot or chance, and the mere carrying of papers, instruments, or certificates showing the result of a lottery or similar enterprise which has already been drawn, and it is not sufficient that numbers were placed upon a slip of paper offering to bet upon a future drawing, or is not an interest in

or dependent upon the event of a lottery or similar enterprise offering prizes dependent upon lot or chance coming within the meaning of the statute as defined under the Act of March 2, 1895, 28 Statutes at Large, p. 963; and therefore if you find that the so-called papers, instruments or certificates charged in the indictment against the defendants to have been caused to have been carried from Newport, in the state of Kentucky, to Cincinnati, in the state of Ohio, was of the kind herein mentioned, your verdict should be not guilty.

I charge you that any paper, certificate or instrument which purports to be or represents a ticket, chance, share or interest in or dependent upon the event of a lottery or similar enterprise offering prizes dependent upon lot or chance must be such papers, certificate, or instrument as upon its face purports to entitle the holder thereof to a chance, share or interest in any co-called lottery or similar enterprise offering prizes dependent upon lot or chance, and the mere carrying of papers, instruments, or certificates showing the result of a lottery or similar enterprise which has already been drawn and which event has already taken place is not such a ticket, chance, share or interest in or dependent upon the event of a lottery or similar enterprise offering prizes dependent upon lot or chance coming within the meaning of the statute as defined under the act of March 2, 1895, 28 Statutes at Large, p. 963; and therefore, if you find that the so-called papers, instruments or certificates charged in the indictment against the defendants to have been caused to have been carried from Newport, in the State of Kentucky, to Cincinnati, in the State of Ohio, in pursuance of a conspiracy, do not upon their face represent a ticket, chance, share, or interest in or dependent upon the event of a lottery or similar enterprise offering prizes dependent upon lot, chance or if said alleged papers, certificates or instruments purporting to be or represent a share, chance or interest in or dependent upon the event of a lottery or similar enterprise offering prizes dependent upon lot or chance are such papers, certificates, or instruments of a lottery which prior to the time alleged of being carried as aforesaid, had already been drawn, then in that case I charge you that said so-called papers, instruments or certificates are not such as are forbidden to be carried within the meaning of said statute.

If the facts tending to show guilt may fairly be reconciled with innocence, then I charge you a reasonable doubt may be considered to exist.

The proof must show it to be the act of two or more,

that is, it must be a joint act, in order to constitute the crime charged.

I charge you, as a matter of law, that the mere passive cognizance of the illegal action of others is not sufficient to show a conspiracy. An active participation is necessary in order to constitute the guilt of a defendant.

In order to establish a conspiracy it is necessary that the jury should find from the proof adduced that at least two persons engaged in it, that is two persons named in the indictment did unlawfully conspire to do the unlawful act charged, for it is manifest that while one person may resolve to do an unlawful act, it is impossible that such person can conspire with himself; there must be some other person conspiring with such person, and in this case it must be proved that it was at least a conspiracy entered into between two of the defendants named in the indictment and that some overt act was done in the County of Hamilton, State of Ohio, in furtherance thereof.

I charge the jury as matter of law, that before they can find the defendants, or either of them, guilty of the offence charged in the indictment, that it must be proven beyond a reasonable doubt,

First, That the defendants, or at least two of them, entered into a conspiracy to do the act complained of in this indictment.

Second, That said conspiracy was entered into in the County of Hamilton as alleged in this indictment.

If the proof adduced fails to satisfy the jury as to the existence of either of the foregoing elements, then your verdict must be not guilty.

The fact that the said H. T. Harrison did write certain numbers upon a slip of paper to be played in lottery or similar enterprise, does not make the same a ticket representing an interest, share or chance in a lottery or similar enterprise dependent upon the event of a lottery dependent upon lot or chance.

John Francis moves the court to charge the jury that the verdict of the jury should be for him and not guilty.

Charles W. Reilley moves the court to charge the jury that as to him the United States has failed to make a case, and that the verdict of the jury should be in his favor.

John Edgar moves the court to charge the jury that as to him the verdict of the jury should be not guilty under each and every count of the indictment.

I charge you as a matter of law from the facts proven that the defendants should go acquit, because there is no legal and valid proof that an offense of conspiracy

was committed within the jurisdiction of this court.

The jury find that the facts tending to show guilt upon the part of the defendants may fairly be reconciled with innocence. I charge you that then a reasonable doubt does exist and the jury should acquit such persons.

If any member of the jury has a reasonable doubt, as to the guilt of any person accused, it is his duty to withhold his assent to a verdict of guilty while such doubt remains in his mind.

It is a well settled rule of law in criminal cases, where the proof adduced is circumstantial, that while they may tend to show strong evidence of guilt, yet, if they are not inconsistent with the innocence of the defendants, the jury should acquit.

The law presumes every man innocent until he is proven guilty, and this presumption continues until removed by proof which satisfies the jury beyond a reasonable doubt.

The jury must find from the testimony adduced that a conspiracy was entered into and the acts done in the county of Hamilton, within the jurisdiction of this court, as alleged in the indictment, or else they must acquit the defendants.

If the jury find that the person named in the indictment, viz., H. T. Harrison, desiring or intending to play policy, wrote out a list of numbers and requested the defendant, Anthony Hoff to send said numbers so as aforesaid written by him to be sent over the river to be played in policy and that he, the said Hoff, gave the said paper containing the numbers to defendant, Edgar, at Newport, in the State of Kentucky, to be carried by him over the river and played in policy, then I charge you there is a variance as between the proof and the allegations of this indictment, and your verdict should be not guilty; and there has been no proof adduced that said numbers had been played, then I charge you that your verdict should be not guilty.

The fact that the defendants or either of them may have committed an unlawful act, to wit, carrying tickets or other papers purporting to represent a share, chance or interest in a lottery, policy or scheme of chance, is not sufficient to warrant a verdict of guilty; it must be proved beyond a reasonable doubt that at least two of the defendants confederated or agreed to do the unlawful act, and in furtherance of said conspiracy, did some overt act in furtherance thereof, and that the conspiring was to carry tickets or other instruments representing a share or interest in the lottery or scheme of chance from New-

port, in the State of Kentucky, to Cincinnati, in the State of Ohio.

A criminal conspiracy consists not merely in the intention of two or more to do an unlawful act, but the gist of the offense is the mutual agreement of the two or more to do the unlawful act in the manner and by the means set forth in the indictment, and some overt act in furtherance thereof.

The fact that the defendants may each or all of them have been engaged in the policy business does not, of itself, warrant the jury finding them guilty as charged, for if the jury find that each acted for himself, that is, without an agreement or confederation to do the unlawful act with the other, then I charge you under this indictment your verdict must be not guilty.

The jury must be satisfied, beyond a reasonable doubt, that each and every element of the crime charged has been proven before they can find a verdict of guilty. If the jury have a reasonable doubt as to the guilt of any defendant, they must solve that doubt in favor of such defendant and acquit him.

The credibility of each and every witness is peculiarly for the jury; the weight to be given the testimony of any witness offered in this case must be determined by the jury.

And the court refused to give said charges, or either of them, to all of which ruling and judgment of the court the defendants and each of them then and there excepted, and thereupon argument of counsel proceeded.

And thereupon came the defendants, Charles W. Reilley, John Francis, Anthony Hoff and Peter Edgar, and presented this, their certain bill of exceptions, which the court finds to have been reasonably taken and observed, and the same being found by the court to be a true bill of exceptions in all respects, is allowed, signed, sealed, and, upon the motion of the defendants, is hereby made a part of the record in this case.

A. C. Thompson,
U. S. District Judge, Sitting as Circuit Judge, S. D. O.

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Col. 192.

12 28 51
G No. 16—
(10)

Exhibit (1) J. A. C.

K—385—98.

29 21 48 65 69 35 46 33 59 1 24 78
1 21 24 29 33 35 46 48 59 65 69 78

H—435—98.

45 63 44 35 23 10 71 8 12 61 7 33
7 8 10 12 23 33 35 44 45 61 63 71

F—355—98.

62 4 24 40 41 16 2 77 56 65 15 44
2 4 15 16 24 40 41 44 56 62 65 77

Exhibit No. 2—J. A. C.

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K—384—98.

34 52 44 33 26 4 74 12 60 18 56 39 71
4 12 18 26 33 34 39 44 52 56 60 71 74

H—434—98.

58 8 39 12 70 31 14 72 49 77 65 28 47
8 12 14 28 31 39 47 49 58 65 70 72 77

F—354—98.

13 6 20 26 51 62 53 1 57 18 43 12 3
1 3 6 12 18 20 26 43 51 53 57 62

Exhibit No. 3—J. A. C.

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There is no Exhibit No. 4.

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"K" —549—
A. M.

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23 35 47 49 58
(20)

Exhibit 5—J. A. C.

No. 520 Saratoga St., Newport, Ky.

Ex. 6.—J. A. C.

"K"
23 35 47 49 58
(20)

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7 27 57 73
7 33 47 74
1 11 39 49
1 13 50 51
5 25 50 75
K
(5)

Exhibit 7—J. A. C.

W. C.
J. S. W.

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13 26 62 75
6 20 26 75

(5)

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75 Day (20)
Ky 1st 12

Ex. 8—J. A. C.

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5 17 70 75
10 22 66 75
7 17 27 75
3 9 17 75
7 9 53 75

(5)

Ky

Ex. 9—J. A. C.

W. C.

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6 10 16 69 75
6 12 23 62 75

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(5)

6 13 26 62
6 50 74 75

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(5)

75—Day (15)
Ky.

Ex. 10—J. A. C. W. C.
G. O. N.

6 10 16 69 75
6 12 23 62 75 (5)

6 13 26 62
6 50 74 75 (5)

75 Day (15)
Ky.

Ex. 11—J. A. C.

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75 5 17 70
75 10 22 66 Ky.
75 7 17 27
75 3 9 17
75 7 9 53

Ex. 12—J. A. C.

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2 11 24 45 69

Ex. 14—J. A. C.

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The Kentucky Lottery decided by the drawing of the Canadian Royal Art Union. Class M. To be drawn at Montreal, Canada, on Saturday, Sept. 30, 1899. This quarter ticket entitles the holder to such prize as may be drawn to its number if presented before expiration of three months from date of said drawing. On Saturday, September 30th, 1899.

Quarter Class M. 25 cts quarter.—4648.

Nine One Three Two Cipher.
( 9 1 3 2 0)
Nine One Three Two Cipher.
( 9 1 3 2 0)
S. F. Dickinson, Manager.

Ex. 13—J. A. C.

Buyers, Take Notice.

Tickets will not hold good if mutilated, pieced, or in any way altered, or cancelled.

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List of Prizes.

| | | | |
|---|---|---|---|
| 1 Prize | $15,000 | is | $15,000 |
| 1 Prize | 4,000 | is | 4,000 |
| 1 Prize | 2,000 | is | 2,000 |
| 1 Prize | 1,000 | is | 1,000 |
| 2 Prizes | 500 | are | 1,000 |
| 5 Prizes | 200 | are | 1,500 |
| 25 Prizes | 60 | are | 4,000 |
| 100 Prizes | 40 | are | 4,000 |
| 200 Prizes | 20 | are | 4,000 |
| 300 Prizes | 12 | are | 3,600 |
| 500 Prizes | 8 | are | 4,000 |

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Approximation Prizes.

| | | | |
|---|---|---|---|
| 100 Prizes | $20 | are | $2,000 |
| 100 Prizes | 12 | are | 1,200 |
| 100 Prizes | 8 | are | 800 |

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Terminal Prizes.

| | | | |
|---|---|---|---|
| 999 Prizes | $4 | are | 3,996 |
| 999 Prizes | 4 | are | 3,996 |

3,434 Prizes amounting to $53,092.

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Kentucky Lottery Co., drawn in public at 238-240 St. James St., Montreal, Canada.

Price of Tickets:

| | |
|---|---|
| Wholes, | 1.00 |
| Halves | .50 |
| Quarters | .25 |

Capital Prizes.

Drawn Sep. 30, 1899.

| | |
|---|---|
| 49094 | $15,000 |
| 14551 | 4,000 |
| 97124 | 2,000 |
| 67256 | 1,000 |
| 49603 | 500 |
| | 500 |

Next Drawing Oct. 24, 1899.

Ex. 15—J. A. C.

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K—548—99.

59 38 56 19 42 8 52 39 2 35 46 26 49
2 8 19 26 35 38 39 42 46 49 52 56 59

H—568—99.

31 21 64 68 48 4 65 12 27 49 70 6 34
4 6 12 21 27 31 34 48 49 64 65 68 70

F—518—99.

53 50 49 70 4 55 15 60 2 18 13 33 52
2 4 13 15 18 33 49 50 52 55 60 70

Ex. 16. J. A. C.

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K—544—99.

8 70 14 64 16 51 68 6 13 32 9 27 72
6 8 9 13 14 16 27 32 51 64 68 70 72

H—564—99.

63 4 52 36 73 53 8 40 70 28 32 44 37
4 8 28 32 36 37 40 44 52 53 65 70 73

E—514—99.

29 60 41 57 10 38 74 11 61 47 16 67 39
10 11 16 29 38 39 41 47 57 60 61 67 74

K—545—99.

38 63 32 67 55 1 61 71 19 26 36 43
1 19 26 32 36 38 43 55 61 63 67 71

H—565—99.

61 6 76 21 8 57 59 42 16 7 17 56
6 7 8 16 17 21 42 56 57 59 61 76

F—515—99.

54 39 64 48 36 47 78 24 76 70 63 50
24 36 39 47 48 50 54 63 64 70 76 78

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K—546—99.

40 68 38 17 44 29 3 42 76 20 73 64 72
3 17 20 29 38 40 42 44 64 68 72 73 76

H—566—99.

54 62 3 38 47 34 65 74 14 37 15 61 4
3 4 14 15 34 37 38 47 54 61 62 65 74

F—516—99.

8 63 71 20 52 65 69 39 76 18 19 2 45
2 8 18 19 20 39 45 63 65 69 71 76

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K—547—99.

1 45 15 24 73 11 6 32 43 13 71 28
1 6 11 13 15 24 28 32 43 45 71 73

H—567—99.

71 13 22 41 39 40 70 26 43 50 65 3
3 13 22 26 39 40 41 43 50 65 70 71

F—517—99.

42 37 21 27 62 25 74 26 1 52 35 64
1 21 25 26 27 35 37 42 52 62 64 74

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K—543—99.

44 49 26 35 18 41 52 10 59 13 43 73
10 13 18 26 35 41 43 44 49 52 59 73

H—563—99.

60 77 1 20 39 12 27 25 71 74 10 62
1 10 12 20 25 27 39 60 62 71 74 77

F—513—99.

58 28 29 77 68 56 7 20 42 23 15 47
7 15 20 23 28 29 42 47 56 58 68 77

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K—542—99.

34 51 29 32 22 33 50 21 76 28 35 68 40
21 22 28 29 32 33 34 35 40 50 51 68 76

H—562—99.

52 15 14 73 20 26 36 17 54 58 23 44 46
14 15 17 20 23 26 36 44 46 52 54 58 73

F—512—99.

1 36 56 49 27 39 31 12 9 78 68 20 63
1 9 12 20 27 31 36 39 49 56 63 68 78

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K—541—99.

36 58 16 2 37 50 48 78 8 22 54 4
2 4 8 16 22 36 37 48 50 54 58 78

H—561—99.

77 63 35 7 28 51 5 70 73 44 43 59
5 7 28 35 43 44 51 59 63 70 73 77

F—511—99.

53 7 21 78 49 25 15 51 65 28 11 31
7 11 15 21 25 28 31 49 51 53 65 78

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K—540—99.

63 37 65 20 40 34 12 25 71 50 19 31 62
12 19 20 25 31 34 37 40 50 62 63 65 71

H—560—99.

74 46 58 5 41 63 29 1 59 30 32 28 49
1 5 28 29 30 32 41 46 49 58 59 63 74

F—510—99.

47 60 72 29 16 27 34 43 63 21 42 2 78
2 16 21 27 29 34 42 43 47 60 63 72 78

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K—539—99.

54 17 48 57 77 66 19 39 32 44 13 6
6 13 17 19 32 39 44 48 54 57 66 77

H—559—99.

31 15 56 78 37 18 48 72 22 58 25 30
15 18 22 25 30 31 37 48 56 58 72 78

F—509—99.

37 7 20 51 55 44 73 50 48 18 26 78
7 18 20 26 37 44 48 50 51 55 73 78

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K—538—99.

12 46 28 33 35 25 5 27 48 53 36 11 40
5 11 12 25 27 28 33 35 36 40 46 48 53

H—558—99.

54 30 19 28 10 8 32 40 71 66 18 16 65
8 10 16 18 19 28 30 32 40 54 65 66 71

F—508—99.

53 17 69 14 9 64 38 70 43 11 42 60 30
9 11 14 17 30 38 42 43 53 60 64 69 70

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K—537—99.

24 61 55 74 50 77 56 60 32 26 57 37
24 26 32 37 50 55 56 57 60 61 74 77

H—557—99.

48 33 17 78 3 54 50 67 70 74 19 76
3 17 19 33 48 50 54 67 70 74 76 78

F—507—99.

29 68 39 36 27 16 51 77 4 23 34 64
4 16 23 27 29 34 36 39 51 64 68 77

K—536—99.

63 15 40 47 27 70 57 24 45 38 3 78 62
3 15 24 27 38 40 45 47 57 62 63 70 78

H—556—99.

65 1 14 67 55 34 61 27 6 36 60 36 47
1 6 14 27 34 36 46 47 55 60 61 65 67

F—506—99.

40 8 51 10 29 28 3 74 33 9 23 13 73
3 8 9 10 13 23 28 29 33 40 51 73 74

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K—535—99.

69 3 77 34 63 21 30 60 35 10 32 48
3 10 21 30 32 34 35 48 60 63 69 77

H—555—99.

74 12 56 72 1 39 35 41 10 38 75 25
1 10 12 25 35 38 39 41 56 72 74 75

F—505—99.

27 43 5 75 17 11 63 18 55 4 48 64
4 5 11 17 18 27 43 48 55 63 64 75

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K—534—99.

44 27 53 52 38 73 23 63 19 34 61 29 50
19 23 27 29 34 38 44 50 52 53 61 63 73

H—554—99.

24 5 39 23 50 61 54 8 38 56 42 71 70
5 8 23 24 38 39 42 50 54 56 61 70 71

F—504—99.

32 35 64 50 42 9 44 6 13 75 10 67 71
6 9 10 13 32 35 42 44 50 64 67 71 75

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K—532—99.

19 54 20 47 39 66 77 38 13 5 42 21
5 13 19 20 21 38 39 42 47 54 66 77

H—553—99.

47 14 18 15 45 41 22 50 62 21 76 42
14 15 18 21 22 41 42 45 47 50 62 76

F—503—99.

30 71 66 13 53 3 15 46 52 35 55 28
3 13 15 28 30 35 46 52 53 55 66 71

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K—532—99.

55 9 43 77 2 38 53 19 78 28 7 32 15
2 7 9 15 19 28 32 38 43 53 55 77 78

H—552—99.

24 49 4 35 17 39 46 66 13 53 36 44 73
4 13 17 24 35 36 39 44 46 49 53 66 73

F—502—99.

59 35 76 2 37 39 51 18 40 66 57 27 72
2 18 27 35 37 39 40 51 57 59 66 72 76

K—531—99.

57 14 30 29 48 15 47 18 26 64 71 44
14 15 18 26 29 30 44 47 48 57 64 71

H—551—99.

15 37 49 25 62 68 29 36 35 52 61 53
15 25 29 35 36 37 49 52 53 61 62 68

F—501—99.

32 55 68 39 73 41 49 16 33 13 54 51
13 16 32 33 39 41 49 51 54 55 68 73

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K—530—99.

41 13 57 56 31 73 58 16 36 70 51 8 65
8 13 16 31 36 41 51 56 57 58 65 70 73

H—550—99.

22 71 59 65 12 66 53 3 74 13 24 4 67
3 4 12 13 22 24 53 59 65 66 67 71 74

F—500—99.

66 78 41 69 27 11 30 14 61 65 46 9 40
9 11 14 27 30 40 41 46 61 65 66 69 78

9 10 11 64 70 67 76
16

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K—529—99.

43 44 30 22 37 50 66 2 68 5 60 29
2 5 22 29 30 37 43 44 50 60 66 68

H—549—99.

14 36 65 76 74 18 29 41 34 22 40 27
14 18 22 27 29 34 36 40 41 65 74 76

F—499—99.

57 66 31 10 24 74 28 71 29 68 16 34
10 16 24 28 29 31 34 57 66 68 71 74

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K—528—99.

76 30 57 70 65 14 62 25 23 68 8 60 52
8 14 23 25 30 52 57 60 62 65 68 70 76

H—548—99.

18 2 51 42 20 24 14 31 55 53 34 9 33
2 9 14 18 20 24 31 33 34 42 51 54 55

F—498—99.

51 48 67 17 26 71 68 64 74 58 39 78 36
19 26 36 39 48 51 58 64 67 68 71 74 78

1 10 11 28 46 53 64 67 70

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K—527—99.

60 59 56 38 58 47 14 6 66 76 71 18
6 14 18 38 47 56 58 59 60 66 71 76

H—547—99.

48 72 28 66 7 46 2 29 20 8 62 65
2 7 8 20 28 29 46 48 62 65 66 77

F—497—99.

45 63 9 43 23 15 62 21 22 67 73 26
9 15 21 22 23 26 43 45 62 63 67 73

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K—526—99.

8 71 40 68 11 9 25 37 33 49 2 14 60
2 8 9 11 14 24 33 37 40 49 60 68 71

H—546—99.

37 50 10 45 62 5 34 8 64 35 43 31 68
5 8 10 31 34 35 37 43 45 50 62 64 68

F—546—99.

75 32 45 77 35 28 40 11 64 66 76 73 24
11 24 28 32 35 40 45 64 66 73 75 76 77

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K—525—99.

50 21 63 22 42 11 70 69 24 78 38 66
11 21 22 24 38 42 50 63 66 69 70 78

H—545—99.

54 66 26 62 75 77 14 52 18 44 3 47
3 14 18 26 44 47 52 54 62 66 75 77

F—495—99.

41 47 16 27 45 65 25 44 21 72 17 5
5 16 17 21 25 27 41 44 45 47 65 72

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K—524—99.

6 20 29 16 43 51 25 68 37 42 5 70 39
5 6 16 20 25 29 37 39 42 43 51 68 70

H—544—99.

46 36 52 74 32 63 78 2 71 5 26 76 16
3 5 16 26 32 36 46 52 63 71 74 76 78

F—494—99.

51 4 36 23 42 38 24 32 33 48 70 78 12
4 12 23 24 32 33 36 38 42 48 51 70 78

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K—523—99.

23 74 57 1 51 72 47 48 71 30 44 75
1 23 30 44 47 48 51 57 71 72 74 75

H—543—99.

31 70 73 28 19 40 15 3 57 52 2 9
2 3 9 50 19 28 31 40 52 57 70 73

F—493—99.

42 29 49 70 6 44 13 4 41 14 34 52
4 6 13 14 29 34 41 42 44 49 52 70

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K—522—99.

72 39 49 41 53 28 48 44 57 26 36 21 64
21 26 28 36 38 39 41 44 49 53 57 64 72

H—542—99.

49 14 16 38 35 10 78 4 68 1 22 74 12
1 4 10 12 14 16 22 35 58 49 68 74 78

F—492—99.

45 54 32 58 31 21 25 9 66 74 15 76 48
9 15 21 25 31 32 45 48 54 58 66 74 76

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K—521—99.

52 2 71 59 6 43 73 78 49 50 24 9
2 6 9 24 43 49 50 52 59 71 73 78

H—541—99.

22 7 78 34 18 1 46 37 21 17 71 59
1 7 17 18 21 22 34 37 46 59 71 78

F—491—99.

62 33 50 25 1 32 13 68 41 71 3 66
1 3 13 25 32 33 41 50 62 66 68 71

K—520—99.

31 32 46 28 56 69 18 16 54 66 17 65 74
16 17 18 28 31 32 46 54 56 65 66 69 74

H—540—99.

40 26 48 33 46 71 55 50 47 54 32 21 3
3 21 26 32 33 40 46 47 48 50 54 55 71

F—490—99.

10 52 73 67 64 46 39 63 66 78 8 26 11
8 10 11 26 39 46 52 54 63 66 67 73 78

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K—519—99.

43 6 78 19 31 72 51 40 30 46 59 38
6 19 30 31 38 40 43 46 51 59 72 78

H—539—99.

9 71 26 12 35 13 49 58 63 77 30 75
9 12 13 26 30 35 49 58 63 71 75 77

F—489—99.

12 39 13 29 73 19 75 41 71 52 23 18
12 13 18 19 23 29 39 41 52 71 73 75

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K—518—99.

70 28 52 13 27 75 38 40 74 11 54 18 46
11 13 18 27 28 38 40 46 52 54 70 74 75

H—538—99.

36 74 24 12 54 78 52 32 65 55 4 26 14
4 12 14 24 26 32 36 52 54 55 65 74 78

F—488—99.

38 14 26 15 43 58 41 39 29 1 30 3 27
1 3 14 15 20 27 29 30 38 39 41 43 58

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K—517—99.

37 71 25 63 11 59 8 49 41 75 6 17
6 8 11 17 25 37 41 49 59 63 71 75

H—537—99.

15 78 70 2 10 39 55 47 62 9 45 58
2 9 10 15 39 45 47 55 58 62 70 78

F—487—99.

77 38 22 49 72 6 21 76 60 66 1 20
1 6 20 21 22 38 49 60 66 72 76 77

10 25 55

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K—516—99.

21 23 65 2 18 5 41 33 64 40 75 53 26
2 5 18 21 23 26 33 40 41 53 64 65 75

H—536—99.

74 30 13 78 64 19 52 62 61 12 14 2 49
2 12 13 19 24 30 49 52 61 62 64 74 78

F—486—99.

4 73 64 20 46 53 39 10 3 52 35 50 37
3 4 10 20 35 37 39 46 50 52 53 64 73

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Ex. 17. J. A. C.

Recognizance for Appearance.

The State of Ohio, Hamilton county, City of Cincinnati, Sct.:

The Police Court of Cincinnati.

Charge———

Prom. Scheme of Chance.

State of Ohio,

vs.

Peter Edgar.

Be it remembered that on this 4th day of October, A. D. 1899, personally appeared Peter Edgar and C. W. Reilley and jointly and severally acknowledged themselves to owe unto the state of Ohio the sum of three hundred (300)

dollars, to be levied of their goods and chattels, lands and tenements, if default be made in the condition following, to wit:

The condition of this recognizance is such that if the above bound Peter Edgar shall personally be and appear before the Police Court of the city of Cincinnati, on the 5th day of Oct. A. D., 1899, and so from day to day until finally disposed of, then and there to answer unto the state of Ohio a charge of promoting scheme of chance and abide the judgment of the court, and not depart without leave, then this recognizance to be void; otherwise it shall be and remain in full force and virtue in law.

Peter Edgar, (Seal.)
C. W. Reilley, (Seal.)

Taken, signed and acknowledged by order of court, this 4th day of October, A. D. 1899.

Thomas J. Noctor,
Clerk of the Police Court of the city of Cincinnati.
By J. B. Menke, Deputy Clerk.

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The Police Court of Cincinnati.

Charge P. S. of C.

State of Ohio,
vs.
Peter Edgar.

Surety on the recognizance in the above case, being sworn according to law, deposeth and saith that he is a resident of the county of Hamilton and state aforesaid, and has real estate located at 2050 Symmes St., and that the same is in his own right and in his own name and unincumbered and the value of the same is two thousand dollars, and that beyond the amount of his debts he is worth the sum of ——— dollars and has property liable to execution in this state equal to the sum of ——— dollars.

C. W. Reilley, (Seal.)

Sworn to and subscribed before me this 4th day of Oct., A. D. 1899.

Thomas J. Noctor,
Clerk of the Police Court of the city of Cincinnati.
By J. B. Menke, Deputy.

231

16160.

Recognizance for Appearance.

State of Ohio,

vs.

Peter Edgar.

Filed 4th day of Oct., A. D. 1899. Thomas J. Noctor, Clerk of the Police Court of the city of Cincinnati. By J. B. Menke, Deputy.

---

Defendant called and failing to appear, and ——— the bail, being called to produce the body of the said ———, and failing so to do, court orders this recognizance to be forfeited ——— this ——— day of ——, A. D. 1899.

Thomas J. Noctor,
Clerk of the Police Court of the City of Cincinnati.
By ——— Deputy.

31

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New Haven, Conn. 16 Collect. Cinc., Oct. 4, '99.

Plume
Nutmeg
Elmore
Weapon
Vocal
Fenton
Punish
Laura
Market
Local
Lemon
Norwood
Mutton
Beauty
Soap

Invite Gas.

Sent.

1c Int. Rev. Stamp. W C Oct. 23, 1899.
A 69 N Y. Lr vs. 12 12 p.

New Haven, Conn. 17 Collect. Cin., Oct. 4, '99.

Frankfort
Plume
Punish
Auction
Image
Morsel
Roland
Nimble
Vapor
Wanton
Obtain
Ashland
Ramsey
Brutus
Beauty
Gas

Liberty Plant.

Sent.

1c Int. Rev. Stamp. W C Oct. 23, 1899.
965 N Y. Lr vs. 120 pp.

---

B
Chicago, Ill. 18 Collect. Cin., Oct. 4, '99.

Henry
Govern
Goodwin
Jester
Eagle
Andrew
Temper
Nutmeg
Brighton
Colfax
Jersey
Simple
Hermit
Auction
Fisher
Invite
Honey

Grief Smile.

Sent.

1c Int. Rev. Stamp. W C Oct., 1899.
78 X M 2 N E. 506 P.

S
Chicago, Ill. 17 Collect. Cin., Oct. 4, '99.

Govern
Weapon
Jersey
Clayton
Onward
George
Lemon
Fremont
Eclipse
Hampton
Empire
Auction
Student
Daniel
Invite
Modest

Snake Naked.

Sent.

1c Int. Rev. Stamps. W C Oct. 4, 1899.
68 X-M 2. 506 P-N E.

---

B
Chicago, Ill. 17 Collect. Cin., Oct. 4|99.

Henry
Plume
Jacob
Turban
Student
Brighton
Talent
Regard
Goodwin
Image
Weapon
Fairfax
Honest
Nimble
Cabin
Liberty

Lime Infant.

Sent.

28 X M 2. N E. 120 W.

M
Chicago, Ill. 17 Collect. Cin., Oct. 4|99.

Frankfort
Plume
Punish
Auction
Image
Morsel
Roland
Nimble
Vapor
Wanton
Obtain
Ashland
Ramsey
Brutus
Cake
Hotel

Liberty Plant.

Sent.

1c Int. Rev. Stamp. W C Oct., 1899.
38 X M 2. N. E. 1208 P.

---

S
Chicago, Ill. 16 Collect. Cin., Oct. 4|99.

Plume
Nutmeg
Elmore
Weapon
Vocal
Fenton
Punish
Laura
Market
Local
Lemon
Norwood
Mutton
Cake
Army

Invite Gas.

Sent.

1c Int. Rev. Stamp. W C Oct., 1899.
18 X. M 2 N E. 1205 P.

M

Chicago, Ill. 18 Collect. Cin., Oct. 4,99.

Frankfort
Govern
Lemon
Image
Fairfax
Colfax
Empire
Andrew
Timid
Pilgrim
Vocal
Daniel
Regard
Lapland
Ashland
Liberty
Snake

Snake Ocean.

Sent.

1c Int. Rev. Stamp. W C Oct., 1899.
8 8 X M 2. X E 509 P.

---

Indianapolis, Ind. 17 Collect. Cin., Oct. 4,99.

Frankfort
Govern
Lemon
Image
Fairfax
Colfax
Empire
Andrew
Timid
Pilgrim
Vocal.
Daniel
Regard
Lapland
Ashland
Garter

Oval Mince.

Sent.

1c Int. Rev. Stamp. W C Oct. 04, 1899.
197 B M W F 5108.

Indianapolis, Ind. 15 Collect. Cin., Oct. 4|99.

Plume
Nutmeg
Elmore
Weapon
Vocal
Fenton
Punish
Laura
Market
Local
Lemon
Norwood
Mutton
Canal

Gift Otis.

Sent.

1c Int. Rev. Stamp. Oct. 03, 1899.
85 B M H. Hi 1209 P.

---

Indianapolis, Ind. 16 Collect. Cin., Oct. 4|99.

Govern
Weapon
Jersey
Clayton
Onward
George
Lemon
Fremont
Eclipse
Hampton
Empire
Auction
Student
Daniel
Norway

Paint Cherry.

Sent.

1c Int. Rev. Stamp. W. C. Oct. 04, 1899.
196 B tn. W X 508 P.

Indianapolis, Ind. 16 Collect. Cin., Oct. 4|99.

Frankfort
Plume
Punish
Auction
Image
Morsel
Roland
Nimble
Vapor
Wanton
Obtain
Ashland
Ramsey
Brutus
Bath

Grain Oval.

Sent.

1c Int. Rev. Stamp. Oct. 03, 1899.
84 B M H. Hi 1207 P.

---

Boston, Mass. 18 Collect. Cin., Oct. 4|99.

Frankfort
Govern
Lemon
Image
Fairfax
Colfax
Empire
Andrew
Timid
Pilgrim
Vocal
Daniel
Regard
Lapland
Ashland
Napkin
Blood

Snake Ocean.

Sent.

1c Int. Rev. Stamp. W C Oct. 04, 1899.
A 160 N Y. M H B V. 508 P.

Boston, Mass. 17 Collect. Cin., Oct. 4|99.

Govern
Weapon
Jersey
Clayton
Onward
George
Lemon
Fremont
Eclipse
Hampton
Empire
Auction
Student
Daniel
Mother
Ocean

Snake Naked.

Sent.

1c Int. Rev. Stamp. W C Oct. 04, 1899.
A 164 N Y. M H B O. 510 P.

---

Boston, Mass. 18 Collect. Cin., Oct. 4|99.

Newport
Govern
Jackson
Brighton
Turban
Verdict
Negro
Onward
Simple
Punish
Fenton
Local
Dublin
Brutus
Jacob
Mother
Inch

Slack Orange.

Sent.

1c Int. Rev. Stamp. W C Oct. 04, 1899.
G 191 N Y. Bwro. 512 P.

Boston, Mass. 17 Collect. Cin., Oct. 4|99.

Newport
Plume
Negro
Brutus
Chestnut
Island
Jackson
Lemon
Hoffman
Hermit
Ramsey
Weapon
Bengal
Canton
Fox
Local

Lime Result.

Sent.

1c Int. Rev. Stamp. W C Oct. 04, 1899.
G 93 N Y. Sn Pg. 1212 P.

---

Boston, Mass. 16 Collect. Cin., Oct. 4|99.

Plume
Nutmeg
Elmore
Weapon
Vocal
Fenton
Punish
Laura
Market
Local
Lemon
Norwood
Mutton
Foam
Dispute

Invite Gas.

Sent.

1c Int. Rev. Stamp. W C Oct. 03, 1899.
970 N Y. Lvrs. 1213 P.

Boston, Mass. 17 Collect. Cin., Oct. 4|99.

Frankfort
Plume
Punish
Auction
Image
Morsel
Roland
Nimble
Vapor
Wanton
Obtain
Ashland
Ramsey
Brutus
Foam
Lark

Liberty Plant.

Sent.

1c Int. Rev. Stamp. W C Oct., 1899.
P 66 N Y. Lrvs. 1208 P.

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Detroit, Mich. 17 Collect. Cin., Oct. 4|99.

Henry
Plume
Jacob
Turban
Student
Brighton
Talent
Regard
Goodwin
Image
Weapon
Fairfax
Honest
Nimble
Book
Insist

Lime Infant.

73 D. Tenn. 1206 P. E B Cl.

Detroit, Mich. 17 Collect. Cin., Oct. 4|99.

Frankfort
Plume
Punish
Auction
Image
Morsel
Roland
Nimble
Vapor
Wanton
Obtain
Ashland
Ramsey
Brutus
Beauty
Gas

Liberty Plant.

Sent.

1c Int. Rev. Stamp. W C Oct. 04, 1899.
E B 1207 P Bl. 74 De. T M.

---

Detroit, Mich. 16 Collect. Cin., Oct. 4|'99.

Plume
Nutmeg
Elmore
Weapon
Vocal
Fenton
Punish
Laura
Market
Local
Lemon
Norwood
Mutton
Beauty
Soap

Invite Gas.

Sent.

1c Int. Rev. Stamp. W C Oct. 03, 1899.
75 D E. 1209 P. E B A N. T M.

Detroit, Mich. 18 Collect. Cin., Oct. 4 99.

Henry
Govern
Goodwin
Jester
Eagle
Andrew
Temper
Nutmeg
Brighton
Colfax
Jersey
Simple
Hermit
Auction
Fisher
Ice
Gas

Grief Smile.

Sent.

1c Int. Rev. Stamp. W C Oct. 04, 1899.
Cd E B. 509 P. 16 W P E.

---

Detroit, Mich. 18 Collect. Cin., Oct. 4 99.

Frankfort
Govern
Lemon
Image
Fairfax
Colfax
Empire
Andrew
Timid
Pilgrim
Vocal
Daniel
Regard
Lapland
Ashland
Incline
Risk

Snake Ocean.

Sent.

1c Int. Rev. Stamp. Oct. 04, 1899.
160 D E. 502 P. E B Cd. (K R—C O.)

Detroit, Mich. 17 Collect. Cin., Oct. 4|99.

Govern
Weapon
Jersey
Clayton
Onward
George
Lemon
Fremont
Eclipse
Hampton
Empire
Auction
Student
Daniel
Ice
Logic

Snake Naked.

Sent.

1c Int. Rev. Stamp. Oct. 04, 1899.
506 P. 159 B E. E B Cel. (K R—C D.)

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Buffalo, N. Y. 16 Collect. Cin., Oct. 4|99.

Plume
Nutmeg
Elmore
Weapon
Vocal
Fenton
Punish
Laura
Market
Local
Lemon
Norwood
Mutton
Confide
Black

Invite Gas.

Sent.

1c Int. Rev. Stamp. W C Oct. 03, 1899.
132 B N. 1206 P. N S Y.

Buffalo, N. Y. 17 Collect. Cin., Oct. 4, '99.

Frankfort
Plume
Punish
Auction
Image
Morsel
Roland
Nimble
Vapor
Wanton
Obtain
Ashland
Ramsey
Brutus
Confide
Ice

Liberty Plant

Sent.

1c Int. Rev. Stamp. W C Oct. 03, 1899.
133 B W. 1207 P M Dy.

---

Buffalo, N. Y. 18 Collect. Cin., Oct. 4, '99.

Frankfort
Govern
Lemon
Image
Fairfax
Colfax
Empire
Andrew
Timid
Pilgrim
Vocal
Daniel
Regard
Lapland
Ashland
Logic
Sacred

Snake Ocean

Sent.

1c. Int. Rev. Stamp. W C. Oct. 04, 1899.
264 B W 508 P. M A n.

Buffalo, N. Y. 17 Collect. Cin., Oct. 4, '99.

Govern
Weapon
Jersey
Clayton
Onward
George
Lemon
Fremont
Eclipse
Hampton
Empire
Auction
Student
Daniel
Leaf
Miser

Snake Naked

Sent.

1c. Int. Rev. Stamp. W C Oct. 04, 1899.
263 B U 507 P.

---

New York City. 17 Collect. K. Cin., Oct. 4, '99.

Govern
Weapon
Jersey
Clayton
Onward
George
Lemon
Fremont
Eclipse
Hampton
Empire
Auction
Student
Daniel
Army
Cake

Snake Naked

Sent.

1c. Int. Rev. Stamp. W C. Oct. 04, 1899.
A 161 Ny. M H Q O. 510 P.

New York City. 16 Collect. R. Cin., Oct. 4, '99

Plume
Nutmeg
Elmore
Weapon
Vocal
Fenton
Punish
Laura
Market
Local
Lemon
Norwood
Mutton
Gather
Doctor
Invite Gas

Sent.

1c. Int. Rev. Stamp. W C Oct. 03, 1899.
A 67 Ny. Lr & s. 1209 P.

---

Cleveland, Ohio. 15 Collect. Cin., Oct. 4, '99.

Plume
Nutmeg
Elmore
Weapon
Vocal
Fenton
Punish
Laura
Market
Local
Lemon
Norwood
Mutton
Canal
Gift Otis

Sent.

1c. Int. Rev. Stamp. W C Oct. 04, 1899.
B 135 H. 1207 S. C N.

Cleveland, Ohio. 16 Collect. Cin., Oct. 4, '99.

Frankfort
Plume
Punish
Auction
Image
Morsel
Roland
Nimble
Vapor
Wanton
Obtain
Ashland
Ramsey
Brutus
Bath
Grain Oval

Sent.

1c. Int. Rev. Stamp. W C Oct. 03, 1899.
B 134 H. 1205 P. Cg V.

---

Cleveland, Ohio. 16 Collect. Cin., Oct. 4, '99.

Govern
Weapon
Jersey
Clayton
Onward
George
Lemon
Fremont
Eclipse
Hampton
Empire
Auction
Student
Daniel
Norway
Paint Cherry

Sent.

1c. Int. Rev. Stamp. W C. Oct. 04, 1899.
B 302 H. Ja 27. 507 P.

Cleveland, Ohio. 17 Collect. Cin., Oct. 4, '99.

Frankfort
Govern
Lemon
Image
Fairfax
Colfax
Empire
Andrew
Timid
Pilgrim
Vocal
Daniel
Regard
Lapland
Ashland
Garter
Oval Mince

Sent.

1c. Int. Rev. Stamp. W C Oct. 04, 1899.
B 303 H. Ja Fy. 510 P.

---

Columbus, Ohio. 15 Collect. Cin., Oct. 4, '99.

Plume
Nutmeg
Elmore
Weapon
Vocal
Fenton
Famish
Lagra
Market
Local
Lemon
Norwood
Mutton
Canal
Gift Otis

Sent.

1c. Int. Rev. Stamp. W C. Oct. 04, 1899.
99 P. oy N y. 1206 P.

Columbus, O. 16 Collect. Cin., Oct. 4, '99.

Govern
Weapon
Jersey
Clayton
Onward
George
Lemon
Fremont
Eclipse
Hampton
Empire
Auction
Student
Daniel
Norway

Paint Cherry

Sent.

1c. Int. Rev. Stamp. W C Oct. 04, 1899.
201 D S V. RS. 509 P. M.

---

Dayton, O. 16 Collect. Cin., Oct. 4, '99.

Frankfort
Plume
Punish
Auction
Image
Morsel
Roland
Nimble
Vapor
Wanton
Obtain
Ashland
Ramsey
Brutus
Bath

Grain Oval

Sent.

1c. Int. Rev. Stamp. W C Oct. 4, 1899.
11 202 Do. B. 1206 P.

Dayton, Ohio. 17 Collect. Cin., Oct. 4, '99.

Frankfort
Govern
Lemon
Image
Fairfax
Colfax
Empire
Andrew
Timid
Pilgrim
Vocal
Daniel
Regard
Lapland
Ashland
Garter

Oval Mince

Sent.

1c. Int. Rev. Stamp. W C Oct. 4, 1899.
212 D2 Po. X. 509 P.

---

Hamilton, Ohio. 16 Collect. Cin., Oct. 4, '99.

Govern
Weapon
Jersey
Clayton
Onward
George
Lemon
Fremont
Eclipse
Hampton
Empire
Auction
Student
Daniel
Norway

Paint Cherry

Sent.

1c. Int. Rev. Stamp. W C Oct. 4, 1899.
45 H N. V A DC. 509 P.

Hamilton, Ohio. 17 Collect. Cin., Oct. 4, '99.

Frankfort
Govern
Lemon
Image
Fairfax
Colfax
Empire
Andrew
Timid
Pilgrim
Vocal
Daniel
Regard
Lapland
Ashland
Garter

Oval Mince

Sent.

1c. Int. Rev. Stamp. W C Oct. 04, 1899.
44 H N V A De. 507 P.

---

Hamilton, Ohio. 16 Collect. Cin., Oct. 4, '99.

Frankfort
Plume
Punish
Auction
Image
Morsel
Roland
Nimble
Vapor
Wanton
Obtain
Ashland
Ramsey
Brutus
Bath

Grain Oval

Sent.

1c. Int. Rev. Stamp. Oct. 03, 1899.
22 H N. DO W. 1208 P.

Hamilton, Ohio. 15 Collect. Cin., Oct. 4, '99.

Plume
Nutmeg
Elmore
Weapon
Vocal
Fenton
Punish
Laura
Market
Local
Lemon
Norwood
Mutton
Canal

Gift Otis

Sent.

1c. Int. Rev. Stamp. W C Oct. 04, 1899.
5 1 P Ny. Rn. 1210 Pm.

---

Springfield, Ohio. 16 Collect. Cin., Oct. 4, '99.

Frankfort
Plume
Punish
Auction
Image
Morsel
Roland
Nimble
Vapor
Wanton
Obtain
Ashland
Ramsey
Brutus
Bath

Grain Oval

Sent.

1c. Int. Rev. Stamp. W C Oct. 03, 1899.
23 A M. qv DP. 1209 P.

Springfield, Ohio. 17 Collect. Cin., Oct. 4, '99.

Frankfort
Govern
Lemon
Image
Fairfax
Colfax
Empire
Andrew
Timid
Pilgrim
Vocal
Daniel
Regard
Lapland
Ashland
Garter

Oval Mince

Sent.

1c. Int. Rev. Stamp. W C Oct. 04, 1899.
50 8 P. 105 P. D N. Y.

---

Ft. Wayne, Ind.
Toledo, Ohio. 15 Collect. Cin., Oct. 4, '99.

Plume
Nutmeg
Elmore
Weapon
Vocal
Fenton
Punish
Laura
Market
Local
Lemon
Norwood
Mutton
Canal

Gift Otis

Sent.

2 1c. Int. Rev. Stamps. W C Oct. 03, 1899.
74 K E P. 75 Kl 12. 0 8 S.

Toledo, Ohio. 16 Collect. Cin., Oct. 4, '99.

Frankfort
Plume
Punish
Auction
Image
Morsel
Roland
Nimble
Vapor
Wanton
Obtain
Ashland
Ramsey
Brutus
Bath

Grain Oval

Sent.

1c. Int. Rev. Stamp. W C Oct. 03, 1899.
73 X KA L D. 120T S.

---

Ft. Wayne, Ind.
Toledo, Ohio. 16 Collect. Cin., Oct. 4, '99.

Govern
Weapon
Jersey
Clayton
Onward
George
Lemon
Fremont
Eclipse
Hampton
Empire
Auction
Student
Daniel
Norway

Paint Cherry

Sent.

1c. Int. Rev. Stamp. W C. Oct. 04, 1899.
145x. 1461 x 5 To P.

Toledo, Ohio. 17 Collect. Cin., Oct. 4, '99.

Frankfort
Govern
Lemon
Image
Fairfax
Colfax
Empire
Andrew
Timid
Pilgrim
Vocal
Daniel
Regard
Lapland
Ashland
Garter

Oval Mince

Sent.

1c. Int. Rev. Stamp. Oct. 04, 1899.
144 x K A. N 506 C.

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Philadelphia, Pa. 18 Collect. Cin., Oct. 4, '99.

Frankfort
Govern
Lemon
Image
Fairfax
Colfax
Empire
Andrew
Timid
Pilgrim
Vocal
Daniel
Regard
Lapland
Ashland
Incline
Risk

Snake Ocean

Sent.

1c. Int. Rev. Stamp. W C. Oct. 04, 1899.
180 P Nan. 507 P M.

Philadelphia, Pa. 17 Collect. Cin., Oct. 4, '99.

Govern
Weapon
Jersey
Clayton
Onward
George
Lemon
Fremont
Eclipse
Hampton
Empire
Auction
Student
Daniel
Ice
Logic

Snake Naked

Sent.

1c. Int. Rev. Stamp. W C. Oct. 04, 1899.
177 P. ON An. 504 P M.

---

Philadelphia, Pa. 17 Collect. Cin., Oct. 4, '99.

Frankfort
Plume
Punish
Auction
Image
Morsel
Roland
Nimble
Vapor
Wanton
Obtain
Ashland
Ramsey
Brutus
Beauty
Gas

Liberty Plant

Sent.

1c. Int. Rev. Stamp. Oct. 04, 1899.
90 P RN. 1206 S. An.

Philadelphia, Pa. 16 Collect. Cin., Oct. 4, '99

Plume
Nutmeg
Elmore
Weapon
Vocal
Fenton
Punish
Laura
Market
Local
Lemon
Norwood
Mutton
Beauty
Soap

Invite Gas.

Sent.

1c. Int. Rev. Stamp. W C Oct. 04, 1899.
91 P Rn. 120 C P an.

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Allegheny, Pa. 16 Collect. Cin., Oct. 4, '99

Frankfort
Plume
Punish
Auction
Image
Morsel
Roland
Nimble
Vapor
Wanton
Obtain
Ashland
Ramsey
Brutus
Bath

Grain Oval.

Sent.

1c. Int. Rev. Stamp. W C Oct. 03, 1899.
97 G Me. 1206 P 45.

Allegheny, Pa. 17 Collect. Cin., Oct. 4, '99.

Frankfort
Govern
Lemon
Image
Fairfax
Colfax
Empire
Andrew
Timid
Pilgrim
Vocal
Daniel
Regard
Lapland
Ashland
Garter

Oval Mince.

Sent.

1c. Int. Rev. Stamp. W C. Oct. 04, 1899.
198 G. D X. D A 507 P.

---

Providence, R. I. 18 Collect. Cin., Oct. 4, '99.

Frankfort
Govern
Lemon
Image
Fairfax
Colfax
Empire
Andrew
Timid
Pilgrim
Vocal
Daniel
Regard
Lapland
Ashland
Mirth
Soap

Snake Ocean

Sent.

1c. Int. Rev. Stamp. W C Oct. 04, 1899.
A 158 A 7. M H B D. 507 P.

J.
Providence, R. I. 17 Collect. Cin., Oct. 4, '99.

Govern
Weapon
Jersey
Clayton
Onward
George
Lemon
Fremont
Eclipse
Hampton
Empire
Auction
Student
Daniel
Lawn
News
Snake Naked

Sent.

1c. Int. Rev. Stamp. W C Oct. 03, 1899.
A 162 N Y. M A B V. 510 P.

---

Providence, R. I. 18 Collect. Cin., Oct. 4, '99.

Newport
Govern
Jackson
Brighton
Turban
Verdict
Negro
Onward
Simple
Punish
Fenton
Local
Dublin
Brutus
Jacob
Lawn
Hail
Slack Orange

Sent.

1c Int Rev. Stamp. W C Oct. 04, 1899.
G 192 N Y. B N A S. 514 P

J.
Providence, R. I. 17 Collect. Cin., Oct. 4, '99

Newport
Plume
Negro
Brutus
Chestnut
Island
Jackson
Lemon
Hoffman
Hermit
Ramsey
Weapon
Bengal
Canton
Evening
Invite

Lime Result

Sent.

1c. Int. Rev. Stamp. Oct. 04, 1899.
G 94 N Y. Sngy. 1213 P.

---

J.
Providence, R. I. 16 Collect. Cin., Oct. 4, '99.

Plume
Nutmeg
Elmore
Weapon
Vocal
Fenton
Punish
Laura
Market
Local
Lemon
Norwood
Mutton
Equal
Cabin

Invite Gas

Sent.

1c. Int. Rev. Stamp. W C Oct. 03, 1899.
A 68 N Y. Lr & s. 1211 P.

Albany, N. Y. Rochester, N. Y. Syracuse, N. Y. C H O. Allentown, Pa. J. C. Allentown, Pa. Camden, N. J. Hartford, Conn.

16 Collect. Cin., Oct. 4, '99.

Frankfort
Plume
Punish
Auction
Image
Morsel
Roland
Nimble
Vapor
Wanton
Obtain
Ashland
Ramsey
Brutus
Bath

Grain Oval

Sent.

7 1c. Int. Rev. Stamps. W C Oct. 03, 1899.
G 86. Wc 92 N Y. S N P P. 12 10 P.

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Albany, N. Y. Rochester, N. Y. Syracuse, N. Y. C H O. Allentown, Pa. J. C. Allentown, Pa. Camden, N. J. Hartford, Conn.

15 Collect. Cin., Oct. 4, '99.

Plume
Nutmeg
Elmore
Weapon
Vocal
Fenton
Punish
Laura
Market
Local
Lemon
Norwood
Mutton
Canal

Gift Otis

Sent.

7 1c. Int. Rev. Stamps. W C Oct. 03, 1899.
1205 Sm. 79-85 N Y. S N P G. 1207 P.

Rosslyn, Va. 17 Collect.

Frankfort
Govern
Lemon
Image
Fairfax
Colfax
Empire
Andrew
Timid
Pilgrim
Vocal
Daniel
Regard
Lapland
Ashland
Garter

Oval Mince

Sent.

1c. Int. Rev. Stamp. Oct. 04, 1899.
284 W. C R B & 506 P.

---

New York City. 17 Collect. Cin., Oct. 4, '99.

Frankfort
Plume
Punish
Auction
Image
Morsel
Roland
Nimble
Vapor
Wanton
Obtain
Ashland
Ramsey
Brutus
Gather
Modest

Liberty Plant

Sent.

A 63 Ny. Lr & S. 1205 P.

New York City. 18 Collect. Cin., Oct. 4, '99.

Frankfort
Govern
Lemon
Image
Fairfax
Colfax
Empire
Andrew
Timid
Pilgrim
Vocal
Daniel
Regard
Lapland
Ashland
Bread
Incline

Snake Ocean

Sent.

1c. Int. Rev. Stamp. W C Oct. 04, 1899.
A 157 N. Y. M H Q P. 506 P.

---

J
Providence, R. I. 17 Collect. Cin., Oct. 4, '99

Frankfort
Plume
Punish
Auction
Image
Morsel
Roland
Nimble
Vapor
Wanton
Obtain
Ashland
Ramsey
Brutus
Equal
Liberty

Liberty Plant.

Sent.

1c. Int. Rev. Stamp. W C Oct. 03, 1899.
A 64 N Y. Lr & S. 1206 P.

New Haven, Conn. 17 Collect. Cin., Oct. 4, '99.
Govern
Weapon
Jersey
Clayton
Onward
George
Lemon
Fremont
Eclipse
Hampton
Empire
Auction
Student
Daniel
Ice
Logic
Snake Naked.

Sent.

4 1c. Int. Rev. Stamps. W C Oct. 4, 1899.
A 163 N Y. M HB V. 510 P.

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Ex. 18.—J. A. C.

17 Collect. Cin., Oct. 4, '99.
Frankfort
Govern
Lemon
Image
Fairfax
Colfax
Empire
Andrew
Timid
Pilgrim
Vocal
Daniel
Regard
Lapland
Ashland
Garter
Oval Mince

Sent.

But 50 E P. 184 Albany, N. Y. 185 Rochester, N. Y. 186 Syracuse, N. Y. C H C. 187 Allentown, Pa. J. C. 188 Allentown, Pa. 189 Camden, N. J. 190 Hartford, Conn.

New Haven, Conn. 18 Collect. Cin., Oct. 4, '99.

Frankfort
Govern
Lemon
Image
Fairfax
Colfax
Empire
Andrew
Timid
Pilgrim
Vocal
Daniel
Regard
Lapland
Ashland
Incline
Risk

Snake Ocean.

Sent.

4 1c. Int. Rev. Stamps. W C Oct. 04, 1899.
A 159 N Y. M H B V. 508 P.

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Exhibit 19. J. A. C.

G

| | | | | |
|---|---|---|---|---|
| 0—Link. | | | | |
| 5—Adams. | 30—Derby. | 55—Grain. | 80—Lunch. | |
| 6—Admire | 31—Desk | 56—Grant | 81—Magic | |
| 7—Admit | 32—Doyle | 57—Green | 82—Midway | |
| 8—Angel | 33—Drake | 58—Grub | 83—Mince | |
| 9—Arcade | 34—Drug | 59—Halpin | 84—Morbin | |
| 10—Ballot | 35—Duty | 60—Harper | 85—Musket | |
| 11—Bank | 36—Easy | 61—Hour—— | 86—Mystic | |
| 12—Banner | 37—Edwin | 62—Hunter | 87—Myrtle | |
| 13—Barber | 3—Emery | 63—Home | 88—Naples | |
| 14—Bates | 39—Escort | 64—Hope | 89—Norfolk | |
| 15—Bath | 40—Evade | 65—Hunch | 90—Norris | |
| 16—Bird | 41—Expel | 66—Hyson | 91—Norway | |
| 17—Brag | 42—Expose | 67—Impart | 92—Ogden | |
| 18—Cadet | 43—Extra | 68—Index | 93—Opal | |
| 19—Canal | 44—Fable | 69—Inflict | 94—Osage | |
| 20—Cargo | 45—Face | 70—Inman | 95—Otis | |

21—Carpet 46—Fair 71—Insult 96—Oval
22—Chase 47—Fast 72—Inwood 97—Paint
23—Cherry 48—Fender 73—Iron 98—Permit
24—Cigar 49—Flag 74—Lace 99—Pike
25—Club 50—Flush 75—Lady 100—Plow
26—Copy 51—Gable 76—Lake 1—Plug
27—Dance 52—Gallon 77—Lock 2—Rack
28—David 53—Garter 78—Lyon 3—Rose
29—Dayton 54—Gift 79—Lucas 4—Spot

0—Link
12—Adams 37—Derby 62—Grain 87—Lunch
13—Admire 38—Desk 63—Grant 88—Magic
14—Admit 39—Doyle 64—Green 89—Midway
15—Angel 40—Drake 65—Grub 90—Mince
16—Arcade 41—Drug 66—Halpin 91—Morbin
17—Ballot 42—Duty 67—Harper 92—Musket
18—Bank 43—Easy 68—Hour 93—Mystic
19—Banner 44—Edwin 69—Hunter 94—Myrtle
20—Barber 45—Emery 70—Home 95—Naples
21—Bates 46—Escort 71—Hope 96—Norfolk
22—Bath 47—Evade 72—Hunch 97—Norris
23—Bird 48—Expel 73—Hyson 98—Norway
24—Brag 49—Expose 74—Impart 99—Ogden
25—Cadet 50—Extra 75—Index 100—Opal
26—Canal 51—Fable 76—Inflict 1—Osage
27—Cargo 52—Face 77—Inman 2—Otis
28—Carpet 53—Fair 78—Insult 3—Oval
29—Chase 54—Fast 79—Inwood 4—Paint
30—Cherry 55—Fender 80—Iron 5—Permit
31—Cigar 56—Flag 81—Lace 6—Pike
32—Club 57—Flush 82—Lady 7—Plow
33—Copy 58—Gable 83—Lake 8—Plug
34—Dance 59—Gallon 84—Lock 9—Rack
35—David 60—Garter 85—Lyon 10—Rose
36—Dayton 61—Gift 86—Lucas 11—Spot

0—Link
14—Adams 39—Derby 64—Grain 89—Lunch
15—Admire 40—Desk 65—Grant 90—Magic
16—Admit 41—Doyle 66—Green 91—Midway
17—Angel 42—Drake 67—Grub 92—Mince
18—Arcade 43—Drug 68—Halpin 93—Morbin
19—Ballot 44—Duty 69—Harper 94—Musket
20—Bank 45—Easy 70—Hour 95—Mystic
21—Banner 46—Edwin 71—Hunter 96—Myrtle
22—Barber 47—Emery 72—Home 97—Naples
23—Bates 48—Escort 73—Hope 98—Norfolk

24—Bath
25—Bird
26—Brag
27—Cadet
28—Canal
29—Cargo
30—Carpet
31—Chase
32—Cherry
33—Cigar
34—Club
35—Copy
36—Dance
37—David
38—Dayton

49—Evade
50—Expel
51—Expose
52—Extra
53—Fable
54—Face
55—Fair
56—Fast
57—Fender
58—Flag
59—Flush
60—Gable
61—Gallon
62—Garter
63—Gift

74—Hunch
75—Hyson
76—Impart
77—Index
78—Inflict
79—Inman
80—Insult
81—Inwood
82—Iron
83—Lace
84—Lady
85—Lake
86—Lock
87—Lyon
88—Lucas

99—Norris
100—Norway
1—Ogden
2—Opal
3—Osage
4—Otis
5—Oval
6—Paint
7—Permit
8—Pike
9—Plow
10—Plug
11—Rack
12—Rose
13—Spot

0—Link
18—Adams
19—Admire
20—Admit
21—Angel
22—Arcade
23—Ballot
24—Bank
25—Banner
26—Barber
27—Bates
28—Bath
29—Bird
30—Brag
31—Cadet
32—Canal
33—Cargo
34—Carpet
35—Chase
36—Cherry
37—Cigar
38—Club
39—Copy
40—Dance
41—David
42—Dayton

43—Derby
44—Desk
45—Doyle
46—Drake
47—Drug
48—Duty
49—Easy
50—Edwin
51—Emery
52—Escort
53—Evade
54—Expel
55—Expose
56—Extra
57—Fable
58—Face
59—Fair
60—Fast
61—Fender
62—Flag
63—Flush
64—Gable
65—Gallon
66—Garter
67—Gift

68—Grain
69—Grant
70—Green
71—Grub
72—Halpin
73—Harper
74—Hour
75—Hunter
76—Home
77—Hope
78—Hunch
79—Hyson
80—Impart
81—Index
82—Inflict
83—Inman
84—Insult
85—Inwood
86—Iron
87—Lace
88—Lady
89—Lake
90—Lock
91—Lyon
92—Lucas

93—Lunch
94—Magic
95—Midway
96—Mince
97—Morbin
98—Musket
99—Mystic
100—Myrtle
1—Naples
2—Norfolk
3—Norris
4—Norway
5—Ogden
6—Opal
7—Osage
8—Otis
9—Oval
10—Paint
11—Permit
12—Pike
13—Plow
14—Plug
15—Rack
16—Rose
17—Spot

0—Link
23—Adams
24—Admire
25—Admit
26—Angel

48—Derby
49—Desk
50—Doyle
51—Drake

73—Grain
74—Grant
75—Green
76—Grub

98—Lunch
88—Magic
100—Midway
1—Mince

| | | | |
|---|---|---|---|
| 27—Arcade | 52—Drug | 77—Halpin | 2—Morbin |
| 28—Ballot | 53—Duty | 78—Harper | 3—Musket |
| 29—Bank | 54—Easy | 79—Hour | 4—Mystic |
| 30—Banner | 55—Edwin | 80—Hunter | 5—Myrtle |
| 31—Barber | 56—Emery | 81—Home | 6—Naples |
| 32—Bates | 57—Escort | 82—Hope | 7—Norfolk |
| 33—Bath | 58—Evade | 83—Hunch | 8—Norris |
| 34—Bird | 59—Expel | 84—Hyson | 9—Norway |
| 35—Brag | 60—Expose | 85—Impart | 10—Ogden |
| 36—Cadet | 61—Extra | 86—Index | 11—Opal |
| 37—Canal | 62—Fable | 87—Inflict | 12—Osage |
| 38—Cargo | 63—Face | 88—Inman | 13—Otis |
| 39—Carpet | 64—Fair | 89—Insult | 14—Oval |
| 40—Chase | 65—Fast | 90—Inwood | 15—Paint |
| 41—Cherry | 66—Fender | 91—Iron | 16—Permit |
| 42—Cigar | 67—Flag | 92—Lace | 17—Pike |
| 43—Club | 68—Flush | 93—Lady | 18—Plow |
| 44—Copy | 69—Gable | 94—Lake | 19—Plug |
| 45—Dance | 70—Gallon | 95—Lock | 20—Rack |
| 46—David | 71—Garter | 96—Lyon | 21—Rose |
| 47—Dayton | 72—Gift | 97—Lucas | 22—Spot |
| 0—Link | | | |
| 26—Adams | 51—Derby | 76—Grain | 1—Lunch |
| 27—Admire | 52—Desk | 77—Grant | 2—Magic |
| 28—Admit | 53—Doyle | 78—Green | 3—Midway |
| 29—Angel | 54—Drake | 79—Grub | 4—Mince |
| 30—Arcade | 55—Drug | 80—Halpin | 5—Morbin |
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| 33—Banner | 58—Edwin | 83—Hunter | 8—Myrtle |
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| 35—Bates | 60—Escort | 85—Hope | 10—Norfolk |
| 36—Bath | 61—Evade | 86—Hunch | 11—Norris |
| 37—Bird | 62—Expel | 87—Hyson | 12—Norway |
| 38—Brag | 63—Expose | 88—Impart | 13—Ogden |
| 39—Cadet | 64—Extra | 89—Index | 14—Opal |
| 40—Canal | 65—Fable | 90—Inflict | 15—Osage |
| 41—Cargo | 66—Face | 91—Inman | 16—Otis |
| 42—Carpet | 67—Fair | 92—Insult | 17—Oval |
| 43—Chase | 68—Fast | 93—Inwood | 18—Paint |
| 44—Cherry | 69—Fender | 94—Iron | 19—Permit |
| 45—Cigar | 70—Flag | 95—Lace | 20—Pike |
| 46—Club | 71—Flush | 96—Lady | 21—Plow |
| 47—Copy | 72—Gable | 97—Lake | 22—Plug |
| 48—Dance | 73—Gallon | 98—Lock | 23—Rack |
| 49—David | 74—Garter | 99—Lyon | 24—Rose |
| 50—Dayton | 75—Gift | 100—Lucas | 25—Spot |

0—Link

30—Adams
31—Admire
32—Admit
33—Angel
34—Arcade
35—Ballot
36—Bank
37—Banner
38—Barber
39—Bates
40—Bath
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56—Desk
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86—Hour
87—Hunter
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90—Hunch
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92—Impart
93—Index
94—Inflict
95—Inman
96—Insult
97—Inwood
98—Iron
99—Lace
100—Lady
1—Lake
2—Lock
3—Lyon
4—Lucas
5—Lunch
6—Magic
7—Midway
8—Mince
9—Morbin
10—Musket
11—Mystic
12—Myrtle
13—Naples
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15—Norris
16—Norway
17—Ogden
18—Opal
19—Osage
20—Otis
21—Oval
22—Paint
23—Permit
24—Pike
25—Plow
26—Plug
27—Rack
28—Rose
29—Spot

0—Link

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99—Inflict
100—Inman
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3—Iron
4—Lace
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19—Norfolk
20—Norris
21—Norway
22—Ogden
23—Opal
24—Osage
25—Otis
26—Oval
27—Paint
28—Permit
29—Pike

55—Club
56—Copy
57—Dance
58—David
59—Dayton

80—Flush
81—Gable
82—Gallon
83—Garter
84—Gift

5—Lady
6—Lake
7—Lock
8—Lyon
9—Lucas

30—Plow
31—Plug
32—Rack
33—Rose
34—Spot

0—Link

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2—Admire
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84—Naples
85—Norfolk
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87—Norway
88—Ogden
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90—Osage
91—Otis
92—Oval
93—Paint
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95—Pike
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97—Plug
98—Rack
99—Rose
100—Spot

0—Link

41—Adams
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43—Admit
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91—Grain
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95—Halpin
96—Harper
97—Hour
98—Hunter
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100—Hope
1—Hunch
2—Hyson
3—Impart
4—Index

16—Lunch
17—Magic
18—Midway
19—Mince
20—Morbin
21—Musket
22—Mystic
23—Myrtle
24—Naples
25—Norfolk
26—Norris
27—Norway
28—Ogden
29—Opal

55—Canal
56—Cargo
57—Carpet
58—Chase
59—Cherry
60—Cigar
61—Club
62—Copy
63—Dance
64—David
65—Dayton

80—Fable
81—Face
82—Fair
83—Fast
84—Fender
85—Flag
86—Flush
87—Gable
88—Gallon
89—Garter
90—Gift

5—Inflict
6—Inman
7—Insult
8—Inwood
9—Iron
10—Lace
11—Lady
12—Lake
13—Lock
14—Lyon
15—Lucas

30—Osage
31—Otis
32—Oval
33—Paint
34—Permit
35—Pike
36—Plow
37—Plug
38—Rack
39—Rose
40—Spot

0—Maple

48—Adams
49—Admire
50—Admit
51—Angel
52—Arcade
53—Ballot
54—Bank
55—Banner
56—Barber
57—Bates
58—Bath
59—Bird
60—Brag
61—Cadet
62—Canal
63—Cargo
64—Carpet
65—Chase
66—Cherry
67—Cigar
68—Club
69—Copy
70—Dance
71—David
72—Dayton

73—Derby
74—Desk
75—Doyle
76—Drake
77—Drug
78—Duty
79—Easy
80—Edwin
81—Emery
82—Escort
83—Evade
84—Expel
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92—Flag
93—Flush
94—Gable
95—Gallon
96—Garter
97—Gift

98—Grain
99—Grant
100—Green
1—Grub
2—Halpin
3—Harper
4—Hour
5—Hunter
6—Home
7—Hope
8—Hunch
9—Hyson
10—Impart
11—Index
12—Inflict
13—Inman
14—Insult
15—Inwood
16—Iron
17—Lace
18—Lady
19—Lake
20—Lock
21—Lyon
22—Lucas

23—Lunch
24—Magic
25—Midway
26—Mince
27—Morbin
28—Musket
29—Mystic
30—Myrtle
31—Naples
32—Norfolk
33—Norris
34—Norway
35—Ogden
36—Opal
37—Osage
38—Otis
39—Oval
40—Paint
41—Permit
42—Pike
43—Plow
44—Plug
45—Rack
46—Rose
47—Spot

0—Maple

52—Adams
53—Admire
54—Admit
55—Angel
56—Arcade
57—Ballot
58—Bank
59—Banner

77—Derby
78—Desk
79—Doyle
80—Drake
81—Drug
82—Duty
83—Easy
84—Edwin

2—Grain
3—Grant
4—Green
5—Grub
6—Halpin
7—Harper
8—Hour
9—Hunter

27—Lunch
28—Magic
29—Midway
30—Mince
31—Morbin
32—Musket
33—Mystic
34—Myrtle

60—Barber 85—Emery 10—Home 35—Naples
61—Bates 86—Escort 11—Hope 36—Norfolk
62—Bath 87—Evade 12—Hunch 37—Norris
63—Bird 88—Expel 13—Hyson 38—Norway
64—Brag 89—Expose 14—Impart 39—Ogden
65—Cadet 90—Extra 15—Index 40—Opal
66—Canal 91—Fable 16—Inflict 41—Osage
67—Cargo 92—Face 17—Inman 42—Otis
68—Carpet 93—Fair 18—Insult 43—Oval
69—Chase 94—Fast 19—Inwood 44—Paint
70—Cherry 95—Fender 20—Iron 45—Permit
71—Cigar 96—Flag 21—Lace 46—Pike
72—Club 97—Flush 22—Lady 47—Plow
73—Copy 98—Gable 23—Lake 48—Plug
74—Dance 99—Gallon 24—Lock 49—Rack
75—David 100—Garter 25—Lyon 50—Rose
76—Dayton 1—Gift 26—Lucas 51—Spot

0—Maple
55—Adams 80—Derby 5—Grain 30—Lunch
56—Admire 81—Desk 6—Grant 31—Magic
57—Admit 82—Doyle 7—Green 32—Midway
58—Angel 83—Drake 8—Grub 33—Mince
59—Arcade 84—Drug 9—Halpin 34—Morbin
60—Ballot 85—Duty 10—Harper 35—Musket
61—Bank 86—Easy 11—Hour 36—Mystic
62—Banner 87—Edwin 12—Hunter 37—Myrtle
63—Barber 88—Emery 13—Home 38—Naples
64—Bates 89—Escort 14—Hope 39—Norfolk
65—Bath 90—Evade 15—Hunch 40—Norris
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73—Cherry 98—Fender 23—Iron 48—Permit
74—Cigar 99—Flag 24—Lace 49—Pike
75—Club 100—Flush 25—Lady 50—Plow
76—Copy 1—Gable 26—Lake 51—Plug
77—Dance 2—Gallon 27—Lock 52—Rack
78—David 3—Garter 28—Lyon 53—Rose
79—Dayton 4—Gift 29—Lucas 54—Spot

0—Maple
60—Adams 85—Derby 10—Grain 35—Lunch
61—Admire 86—Desk 11—Grant 36—Magic

62—Admit
63—Angel
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83—David
84—Dayton
87—Doyle
88—Drake
89—Drug
90—Duty
91—Easy
92—Edwin
93—Emery
94—Escort
95—Evade
96—Expel
97—Expose
98—Extra
99—Fable
100—Face
1—Fair
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3—Fender
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5—Flush
6—Gable
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12—Green
13—Grub
14—Halpin
15—Harper
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17—Hunter
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27—Inwood
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38—Mince
39—Morbin
40—Musket
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42—Myrtle
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49—Osage
50—Otis
51—Oval
52—Paint
53—Permit
54—Pike
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56—Plug
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58—Rose
59—Spot

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63—Adams
64—Admirt
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87—Dayton 12—Gift 37—Lucas 62—Spot

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69—Adams 94—Derby 19—Grain 44—Lunch
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77—Barber 2—Emery 27—Home 52—Naples
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90—Copy 15—Gable 40—Lake 65—Plug
91—Dance 16—Gallon 41—Lock 66—Rack
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93—Dayton 18—Gift 43—Lucas 68—Spot

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77—Ballot 2—Duty 27—Harper 52—Musket
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| 95—Cargo | 20—Face | 45—Inman | 70—Otis |
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| 3—David | 28—Garter | 53—Lyon | 78—Rose |
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| 100—Cadet | 25—Extra | 50—Index | 75—Opal |
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| 5—Cherry | 30—Fender | 55—Iron | 80—Permit |
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| 7—Club | 32—Flush | 57—Lady | 82—Plow |
| 8—Copy | 33—Gable | 58—Lake | 83—Plug |
| 9—Dance | 34—Gallon | 59—Lock | 84—Rack |
| 10—David | 35—Garter | 60—Lyon | 85—Rose |
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| 40—Carpet | 65—Fair | 90—Insult | 15—Oval |
| 41—Chase | 66—Fast | 91—Inwood | 16—Paint |
| 42—Cherry | 67—Fender | 92—Iron | 17—Permit |
| 43—Cigar | 68—Flag | 93—Lace | 18—Pike |
| 44—Club | 69—Flush | 94—Lady | 19—Plow |
| 45—Copy | 70—Gable | 95—Lake | 20—Plug |
| 46—Dance | 71—Gallon | 96—Lock | 21—Rack |
| 47—David | 72—Garter | 97—Lyon | 22—Rose |
| 48—Dayton | 73—Gift | 98—Lucas | 23—Spot |

| | | | |
|---|---|---|---|
| 0—Sharp | | | |
| 27—Adams | 52—Derby | 77—Grain | 2—Lunch |
| 28—Admire | 53—Desk | 78—Grant | 3—Magic |
| 29—Admit | 54—Doyle | 79—Green | 4—Midway |
| 30—Angel | 55—Drake | 80—Grub | 5—Mince |
| 31—Arcade | 56—Drug | 81—Halpin | 6—Morbin |
| 32—Ballot | 57—Duty | 82—Harper | 7—Musket |
| 33—Bank | 58—Easy | 83—Hour | 8—Mystic |
| 34—Banner | 59—Edwin | 84—Hunter | 9—Myrtle |
| 35—Barber | 60—Emery | 85—Home | 10—Naples |
| 36—Bates | 61—Escort | 86—Hope | 11—Norfolk |
| 37—Bath | 62—Evade | 87—Hunch | 12—Norris |
| 38—Bird | 63—Expel | 88—Hyson | 13—Norway |
| 39—Brag | 64—Expose | 89—Impart | 14—Ogden |
| 40—Cadet | 65—Extra | 90—Index | 15—Opal |
| 41—Canal | 66—Fable | 91—Inflict | 16—Osage |
| 42—Cargo | 67—Face | 92—Inman | 17—Otis |
| 43—Carpet | 68—Fair | 93—Insult | 18—Oval |
| 44—Chase | 69—Fast | 94—Inwood | 19—Paint |
| 45—Cherry | 70—Fender | 95—Iron | 20—Permit |
| 46—Cigar | 71—Flag | 96—Lace | 21—Pike |
| 47—Club | 72—Flush | 97—Lady | 22—Plow |
| 48—Copy | 73—Gable | 98—Lake | 23—Plug |
| 49—Dance | 74—Gallon | 99—Lock | 24—Rack |
| 50—David | 75—Garter | 100—Lyon | 25—Rose |
| 51—Dayton | 76—Gift | 1—Lucas | 26—Spot |

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| 0—Sharp | | | |
| 31—Adams | 56—Derby | 81—Grain | 6—Lunch |

32—Admire
33—Admit
34—Angel
35—Arcade
36—Ballot
37—Bank
38—Banner
39—Barber
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41—Bath
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93—Impart
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96—Inman
97—Insult
98—Inwood
99—Iron
100—Lace
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3—Lock
4—Lyon
5—Lucas
7—Magic
8—Midway
9—Mince
10—Morbin
11—Musket
12—Mystic
13—Myrtle
14—Naples
15—Norfolk
16—Norris
17—Norway
18—Ogden
19—Opal
20—Osage
21—Otis
22—Oval
23—Paint
24—Permit
25—Pike
26—Plow
27—Plug
28—Rack
29—Rose
30—Spot

0—Straw

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37—Admire
38—Admit
39—Angel
40—Arcade
41—Ballot
42—Bank
43—Banner
44—Barber
45—Bates
46—Bath
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32—Plug

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59—David
60—Dayton
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84—Garter
85—Gift
8—Lock
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10—Lucas
33—Rack
34—Rose
35—Spot

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42—Adams
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|---|---|---|---|
| 65—Carpet | 90—Fair | 15—Insult | 40—Oval |
| 66—Chase | 91—Fast | 16—Inwood | 41—Paint |
| 67—Cherry | 92—Fender | 17—Iron | 42—Permit |
| 68—Cigar | 93—Flag | 18—Lace | 43—Pike |
| 69—Club | 94—Flush | 19—Lady | 44—Plow |
| 70—Copy | 95—Gable | 20—Lake | 45—Plug |
| 71—Dance | 96—Gallon | 21—Lock | 46—Rack |
| 72—David | 97—Garter | 22—Lyon | 47—Rose |
| 73—Dayton | 98—Gift | 23—Lucas | 48—Spot |

0—Straw

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|---|---|---|---|
| 53—Adams | 78—Derby | 3—Grain | 28—Lunch |
| 54—Admire | 79—Desk | 4—Grant | 29—Magic |
| 55—Admit | 80—Doyle | 5—Green | 30—Midway |
| 56—Angel | 81—Drake | 6—Grub | 31—Mince |
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| 66—Cadet | 91—Extra | 16—Index | 41—Opal |
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| 72—Cigar | 97—Flag | 22—Lace | 47—Pike |
| 73—Club | 98—Flush | 23—Lady | 48—Plow |
| 74—Copy | 99—Gable | 24—Lake | 49—Plug |
| 75—Dance | 100—Gallon | 25—Lock | 50—Rack |
| 76—David | 1—Garter | 26—Lyon | 51—Rose |
| 77—Dayton | 2—Gift | 27—Lucas | 52—Spot |

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| 56—Adams | 81—Derby | 6—Grain | 31—Lunch |
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42—Mince

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| 70—Bank | 95—Easy | 20—Hour | 45—Mystic |
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| 76—Brag | 1—Expose | 26—Impart | 51—Ogden |
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0—Hawk

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| 100—Brag | 25—Expose | 50—Impart | 75—Ogden |

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| 5—Chase | 30—Fast | 55—Inwood | 80—Paint |
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| 7—Cigar | 32—Flag | 57—Lace | 82—Pike |
| 8—Club | 33—Flush | 58—Lady | 83—Plow |
| 9—Copy | 34—Gable | 59—Lake | 84—Plug |
| 10—Dance | 35—Gallon | 60—Lock | 85—Rack |
| 11—David | 36—Garter | 61—Lyon | 86—Rose |
| 12—Dayton | 37—Gift | 62—Lucas | 87—Spot |

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| 93—Admire | 18—Desk | 43—Grant | 68—Magic |
| 94—Admit | 19—Doyle | 44—Green | 69—Midway |
| 95—Angel | 20—Drake | 45—Grub | 70—Mince |
| 96—Arcade | 21—Drug | 46—Halpin | 71—Morbin |
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| 4—Brag | 29—Expose | 54—Impart | 79—Ogden |
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| 8—Carpet | 33—Fair | 58—Insult | 83—Oval |
| 9—Chase | 34—Fast | 59—Inwood | 84—Paint |
| 10—Cherry | 35—Fender | 60—Iron | 85—Permit |
| 11—Cigar | 36—Flag | 61—Lace | 86—Pike |
| 12—Club | 37—Flush | 62—Lady | 87—Plow |
| 13—Copy | 38—Gable | 63—Lake | 88—Plug |
| 14—Dance | 39—Gallon | 64—Lock | 89—Rack |
| 15—David | 40—Garter | 65—Lyon | 90—Rose |
| 16—Dayton | 41—Gift | 66—Lucas | 91—Spot |

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And afterwards, to wit, on the 9th day of April, A. D. 1900, the following petition for writ of error was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Petition for Writ of Error.

In the District Court of the United States, Southern District of Ohio, Western Division.

The United States of America, Plaintiff,
vs.
Charles W. Reilley, John Francis, Anthony Hoff and Peter Edgar, Defendants.
No. ....

Petition for Writ of Error.

Now comes Charles W. Reilley, John Francis, Anthony Hoff and Peter Edgar, and represent to the court

that there is error in the record and proceedings herein in this, to wit:

That the court erred in overruling the motions to quash the indictments filed herein for the various reasons assigned in the respective motions as filed by each defendant herein.

That the court erred in overruling the respective demurrers filed by each defendant herein for the various reasons assigned in the respective demurrers of each defendant.

Because the court erred in the admission of certain testimony upon the trial of this cause offered by the United States of America, and objected to by the defendants, and because the court erred in refusing to direct the jury to find a verdict of not guilty, to all of which the defendants at the time excepted.

And the court further committed error in refusing to give the jury certain special charges asked by the defendants, to which refusal the defendants at the time excepted.

And the court further erred in charging the jury in manner and form as the court did charge the said jury, to which said defendants at the time excepted.

And further that the court did err in overruling the respective motions for a new trial as filed by the defendants, and also in overruling the respective motions filed by defendants in arrest of judgment, all of which will more fully and particularly appear in the assignment of errors filed herein, and to which these petitioners refer for a more detailed statement.

And these petitioners say that said errors can not be corrected except by a writ of error to issue out of this court returnable to the Court of Appeals, and which writ of error to the Court of Appeals of the United States these petitioners respectfully pray may be allowed, and that upon the return thereof the said errors may be corrected and the judgment rendered herein may be set aside and held for naught and a new trial herein may be granted and these petitioners will ever pray.

Shay & Cogan,
Attorneys for Petitioners.

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And afterwards, to wit, on the 9th day of April, A. D. 1900, the following assignment of errors was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

## Assignment of Errors.

The District Court of the United States, Southern District of Ohio, Western Div.

The United States of America, Plaintiff,
vs.
Charles W. Reilley, John Francis, Anthony Hoff and Peter Edgar, Defendants.
No. ....

## Assignment of Errors.

Now come the defendants, Charles W. Reilley, John Francis, Anthony Hoff and Peter Edgar, and assign as errors committed by the court herein as follows:

First. The action of the court in overruling the motion to quash the indictment as filed by Charles W. Reilley for the reasons therein stated, and excepted to by said defendant.

2nd. The action of the court in overruling the motion to quash the indictment as filed by John Francis for the reasons stated therein and excepted to by said defendant.

3rd. The action of the court in overruling the motion to quash the indictment as filed by Anthony Hoff, for the reasons therein stated and excepted to by said defendant.

4th. The action of the court in overruling the motion to quash the indictment as filed by Peter Edgar for the reasons therein stated and excepted to at the time.

5th. The action of the court in overruling the demurrer filed herein by Charles W. Reilley for the reasons therein stated, and to which action of the court the defendant at the time excepted.

6th. The action of the court in overruling the demurrer filed herein by John Francis for the reasons therein stated and to which action of the court the defendant at the time excepted.

7th. The action of the court in overruling the demurrer filed herein by Anthony Hoff for the reasons therein stated and to which action of the court the defendant at the time excepted.

8th. The action of the court in overruling the demurrer filed herein by Peter Edgar for the reasons therein stated and to which action of the court the defendant at the time excepted.

Defendants further assign for error the action of the court in overruling the objection of the defendants and their motion to strike out the answers to the various questions put to A. L. France and excepted to at the time, commencing on page 1 of the bill of exceptions filed herein, wherein he is asked "to state to the jury carefully and explain to them what the game of policy is," to which question he answered "the policy business is the outgrowth of what was formerly known at the lottery business. The lottery business consisted of combinations of numbers printed upon tickets, and persons making the purchase at that time and only selecting such numbers as were on these tickets. Afterwards this game of policy was conceived, whereby the parties could select their own numbers and play as many of them as they wanted, and in the end it succeeded the lottery business, and for quite a number of years there has not been any lottery tickets issued at all. People simply go into the office, select their own numbers and they are placed upon slips of paper, returned to the head office; their 'books' are there, called in lottery parlance, and these numbers are entered on these books and returned to the company. The lottery or policy that is decided by the drawing, consists in placing 78 numbers in a wheel, that wheel is revolved until the numbers are properly mixed, and in the morning there are 12 of these numbers drawn out and in the evening 13; these numbers are then printed, and the official prints so called are sent to the vendors, where the players can go and see if they have won or lost."

The defendants further assign for error the action of the court in overruling the objection of the defendants to the question: "Now explain how that would be done to the jury, and carry that whole transaction through," as shown more fully upon page 3 of the bill of exceptions, and the answer thereto, to all of which action of the court the defendants then and there excepted.

The defendants further assign for error the action of the court in overruling the objection to the question as appears on page 4 of the bill of exceptions, to wit: "I want you to describe how it was printed," and the answer was, "it was printed on a piece of square paper about that long," and to the action of the court in refusing to rule out the same.

Defendants further assign for error the action of the court as appears from page 4 of the record, to wit, the court said, "The court is permitting this witness to describe what the game of policy is, and if that is a part of the description, you may proceed," to which the de-

fendants then and there, by their counsel, excepted, to which the witness answered "printed upon a square piece of paper about the size (indicating); whereupon the court said "this witness is here practically as an expert to explain what the game of policy is."

Defendants further assign as error the action of the court in overruling the objection of defendants and their motion to strike out the answers to the various questions put to Charles Pelton, and particularly to the question "you may state what is your source of knowledge with reference to Mr. Reilley being in the policy business," and the refusal of the court to rule out his answer thereto, "I speak from personal observation, every month of these five years, almost every week, seeing him at his appropriate place at certain hours, in the policy business, down to last month."

And the defendants further assign for error the action of the court in overruling the defendants' objections to the questions put to Charles Pelton, to wit: "Explain to the jury particularly what you mean by that," which was objected to, which objection was overruled, the defendants then and there excepted, and to the answer thereto, "Between 11 and 12 in the forenoon, and 4 and 5 in the afternoon, he visited the several shops which constituted his route before going to headquarters, and that is his duty as a canvasser," all of which will more fully appear on page 11 of the bill of exceptions herein.

The defendants further assign for error the overruling of the objection to the question "what is a policy shop?" and the failure of the court to rule out the answer thereto, to which the defendants excepted and which was as follows, to wit: "A place where bets are received on the prospective winning numbers," to which the defendants then and there excepted; and to the further answer of the witness "it is a place where policy writers accept bets in the form of a ticket. I can produce one obtained by myself, on which are written three or more numbers, which constitute my choice of what will be the next winning numbers on the next official print bearing the winning numbers from headquarters."

The defendants further assign for error the action of the court in refusing to rule out the question and answer as appears on page 12, to wit: "This ticket I hold in my hand is what?" Answer, "it is a policy ticket from Henry Cutter's shop on Vine Street," to all of which ruling of the court defendants then and there excepted.

Defendants further assign for error the action of the court in failing to rule same out, permitting the said

answer to stand as appears on page 13, of the bill of exceptions, and to which the defendants, by their counsel, excepted at the time, and which said paper was offered in evidence by counsel for the government and marked "Exhibit 1, J. A. C."

Defendants further assign for error the action of the court in refusing to sustain the objection to the question, "What, if anything, is given to the policy player as evidence of the amount he invests?" and to the further question, "When a man goes into a vendor's policy shop and buys or chooses three numbers and invests ten cents, what is done by the vendor?" to which question counsel for defendants objected, which objection was overruled by the court, to which the defendants excepted, and the witness answered, "In all the shops, with one exception, that I am acquainted with, the patron finds a shelf or table, with such pieces of paper as this blank paper; he makes out his own ticket, writing the official number of the system at the top; if it is the system that is in this case, if he wanted to bet in the Kentucky part of it, he would put a 'K' at the top, then write his three or more numbers under it and the amount paid below that, and make a duplicate of it; one he hands in with his money and the other he retains so as to compare with the official print when he returns, to see if he has won. There is nothing given by the agent."

And defendants further assign as error the action of the court in permitting the question as appears on page 16 of the bill of exceptions, to wit: "You stated, Mr. Pelton, that the player, when he choses his numbers, he generally made a copy and handed one copy to the vendor with his money and kept the other?" Ans., "Yes, sir." "What is done with the money and the copy retained by the vendor?" to which said witness answered as follows: "About the time they close up the transactions for that half of the day, each vendor makes what is called a book, that is, a record of these individual bets, with the amount and the numbers; that book is taken up by the carriers at the proper time, between 11 and 12 o'clock, and taken to headquarters to be canvassed, where they receive a slip with the winning numbers of that half day and compare it with these individual bets. In case of a winning, a record is made of the winnings and the winning sent back."

Defendants further assign for error the action of the court in overruling the objection of the defendants to the question as found on page 16 of this bill of exceptions, "State what you know about Mr. Hoff in reference to the

policy game," and of his answer thereto, as appears further on page 17, to wit: "I accompanied two officers who visited Mr. Hoff's shop about 11 o'clock, October 4th last, where we found official prints, quite a package of them, and copies of policy plays, and where he admitted in my presence that he had accepted policy bets and sent them over the river to headquarters. He made this statement in my presence."

The defendants further assign for error the action of the court in refusing to rule out said answer, to which refusal defendants then and there excepted.

Defendants further assign for error the action of the court in overruling the objections of the defendants to the question, "What was done with the papers and official printing, etc., found in Hoff's possession or place of business that day," and his answer thereto, as appears upon pages 17 and 18 of the bill of exceptions.

Defendants further assign for error the action of the court in refusing to sustain the objection as appears on page 18 of the bill of exceptions, to the following question: "State under what circumstances you met him."

Defendants further assign for error the action of the court in overruling the objection on page 18, "What did you observe in reference to Room 64, St. Paul Bldg., and the answer thereto, "The sign of Cannel Coal, and some other name of coal, Bird's Eye Coal, I think. I found the door locked invariably; I observed Mr. Francis go in and three well known policy men at 11 o'clock, and Mr. Francis generally went in a few minutes before; the others quite promptly to go in within 5 minutes before or after 11 o'clock each forenoon, and 4 o'clock each afternoon," and the further answer, "Mr. Spencer, a policy agent on Vine Street."

Defendants further assign for error the action of the court in refusing to sustain the objection as found on page 19, to the question, "Who were the three other gentlemen," and in ruling out the answer thereto, to wit: "I accompanied the officers and visited this place; Mr. Henry Myer, of 113 E. Third Street, who has 12 shops of the same system, 10 or 12 under his care, Mr. Bickel; these three accompanied Mr. Francis. They stayed in there an hour. The first to issue from that door was Mr. Francis, as a rule; several times I traced Mr. Spencer as the first one who came out, and he went directly to the office of the Western Union Telegraph Company, but most of the times of these observations, in the last year or year and one-half, Mr. Francis," and the refusal of the court to rule out the question and answer to it as re-

quested, as more fully appears on page 19 and 20 of the bill of exceptions, is further assigned for error.

Defendants further assign for error the action of the court in permitting the answer, to wit: "In August, '98, I was present with the officers when they raided this room, Aug. 16th, 1898, Lieut. Poppe in command of four officers, Mr. Albert L. France was along, and the room has a double apartment, a door between, a vault, a large vault in the inner apartment. Mr. Francis promptly at 5 o'clock, August 16, issued from there as usual, apparently on his road to the telegraph office, the others still inside, and the officers arrested him, and Lieut. Poppe demanded entrance to the rear apartment; they did not give it, and he was obliged to burst the door open, and found these three men there, Bickel and Spencer and Myers, and the documents which they obtained was a well bound volume in fine leather, which Mr. Francis is able to explain; I was not familiar enough to be able to explain the significance of the book," and the refusal of the court, at the request of the defendants, to rule the foregoing answers as appear on page 20, is assigned for error.

The defendants further assign for error the action of the court in refusing to sustain the objection on page 20 to the question, "Have you been observing and do you know who comes out of the St. Paul Building and goes to the Western Union Telegraph Office, if anyone, or who did, in October of last year and previously to that time?" which question was objected to by defendants, which objection was overruled by the court, to which the defendants excepted.

And the further question as appears on page 21 of the bill of exceptions is assigned for error in the refusal of the court to sustain defendants' objection thereto, to wit: "Is that room still being occupied in the St. Paul Building by the defendant, Francis and others?" Answer, "64, yes, 64," and the answer thereto and the action of the court in that regard is assigned for error.

And the further question upon said page, to wit: "Were you ever with the officers of this city when a raid was made upon Mr. Reilley's place of business on Sixth Street?" and the answer thereto, is assigned for error.

The defendants further assign for error the action of the court in permitting the further question, "What, if anything, was found in his place upon those raids," and the refusal of the court to rule out the answer thereto, to wit: "Always found a package of official prints, which characterizes a policy shop as a chief feature al-

ways. Nobody gets packages of these official prints except the policy agents."

Defendants further assign for error the action of the court in overruling the objection of the defendants on page 22 to the question, "State, if you know, where the official prints found in Reilley's place came from," to the overruling of which objection defendants then and there excepted.

Defendants further assign for error the action of the court in overruling the objection of the defendants to the question as it appears on page 24 of the record, to wit: "I will hand you a book, Mr. Pelton, state if that is the book you found in the raid of the St. Paul Building, Room 64, that you alluded to in your testimony before dinner."

Defendants further assign for error the action of the court in overruling the objection as appears on page 24 to the question, "State what you know about Room 64 in the St. Paul Building, having a telephone in it," and the answer thereto.

Defendants further assign for error the action of the court in overruling defendants' objection to list of questions found on page 26 of the bill of exceptions, to wit: "Do you know where they were printed," and following on down to the action of the court in permitting the witness to answer the various questions to be answered, assuming that the evidence will be offered to connect the defendants with that transaction, to wit: the papers and delivery thereof to all of which action of the court defendants then and there excepted, which will more fully appear on page 26 of the bill of exceptions.

And the defendants further assign for error the failure of the court, on page 27, to rule out testimony in relation to the prints, etc., hereinbefore assigned for error, and the refusal to rule same out as requested by defendants' counsel at the time, as will more fully appear on page 27 of the bill of exceptions.

The defendants further assign for error the action of the court, on pages 46 and 47, of the bill of exceptions, in overruling the objection of the defendants to the admission of certain papers in evidence offered at that time, which are attached to the bill of exceptions and marked "Exhibits 2 and 3" and assigned for error.

Defendants further assign for error the action of the court in overruling the objection to the question put to the witness Harrison, found on page 54, to wit: "When, if at any time, did you receive word whether the play you made was successful," to which action of the court the

defendants then and there excepted.

And defendants further assign for error the action of the court in overruling the objection of the defendants as appears more fully on pages 55 and 56 of the bill of exceptions, and permitting the witness Harrison to refresh his memory from memoranda books in answer to a question, "please give the numbers to the jury, that you played upon that day."

Defendants further assign for error the action of the court in overruling the defendants' objection as found on pages 59 and 60: "I will show you a paper and ask you if that is it?" "I will ask you if that is the copy or part of the play that you retained on the morning of the fourth," which said paper was offered in evidence and marked "Exhibit 5" to all of which the defendants then and there excepted and assign the same for error.

Defendants further assign for error the action of the court in permitting the United States to offer Exhibit 6 in evidence as appears on page 61 of the bill of exceptions, and objected to at the time by the defendants.

Defendants further assign for error the action of the court in overruling the objection of the defendants and permitting the witness Harrison to answer the question as found on pages 73 and 74 and the answers thereto, to wit: "You say particularly, what other object had you besides that?" and his answer thereto, "I have got to show the reason or else it would mislead and put me in a false position. I must say as a matter of justice to myself, that being employed by the League, I looked out for all violations of the law, not only this, but any other violation of the law and I had to use my own judgment in the reports. That was the object. And this was among the rest, that was all."

And the defendants further assign for error the action of the court in refusing to rule out the testimony as requested on page 74 as to the testimony of the witness with reference to the connection of Edgar with the business in that the same was not knowledge but hearsay upon the part of the witness, etc., as more fully appears upon page 74 of the bill of exceptions.

And the defendants further assign for error the action of the court in overruling the objection to the question as shown on page 76 of the bill of exceptions, to wit: "Describe the gentleman that paid you," to which action of the court the defendants then and there excepted, and to the action of the court in refusing to rule out the testimony of the witness as appears on page 77, in the failure of the court to rule out certain parts of the testimony of

the witness, as is more fully apparent therein, and excepted to at the time, and same is assigned for error.

And defendants further assign for error the action of the court in refusing to sustain the objection made by the defendants as appears on page 78, to the question: "Mr. Page, have you any agreement or contract of any kind, as representing the Western Union Telegraph Company with any one claiming to be connected with the Kentucky Lottery," to which ruling of the court, defendants then and there excepted.

Defendant further assigns for error the action of the court in refusing to sustain the objection of the defendants as appears on page 79 of the bill of exceptions to the question: "Does that firm do business with the Western Union Telegraph Company," and the answer of the witness thereto, "I think they do. It would probably be well for me to state that, as manager of the Cincinnati office, I never come in contact with customers in the filing of their messages. I never saw them unless I go through the files for the purpose of finding out a matter of that kind," and the same is assigned for error.

And defendants further assign for error the refusal of the court to sustain the objection made by the defendants to the question: "Did you ever authorize an account to be kept with this firm," to which ruling of the court the defendants then and there excepted, all of which will more fully appear on page 79 of the bill of exceptions.

Defendants further assign for error the action of the court in its refusal to sustain the objection to the question: "I will now hand you four other papers and state if those were the papers found upon him that morning," and the answer of the witness, "That is one; that is the other," to all of which question and the answer thereto, defendants by their counsel objected, which objection was by the court overruled, to which the defendants then and there excepted and same is assigned for error.

Defendants further assign for error the action of the court in refusing to rule out certain testimony relative to the identity of the Exhibits 7, 8, 9 and 10, which were offered by plaintiff in evidence, and attached to this bill of exceptions, to which ruling of the court, defendants by their counsel, excepted at the time, all of which will more fully appear on page 90 of the bill of exceptions.

Defendants further assign for error the action of the court in refusing to sustain the objection made by the defendants to the question on page 91: "Can you tell me how long Mr. Edgar remained in jail or in the Police Hammond St. Station after he was searched upon the morning

of the fourth," which objection was overruled by the court, to which ruling of the court defendants, by their counsel, excepted at the time.

And defendants further assign for error the action of the court in refusing to rule out the answer to the question: "From where have you seen him and your observation of him during this time, you may state what employment or business that Mr. Edgar is in," and the answer of the witness thereto: "I know him, I know him very well; I know him to be a policy writer," to which question and answer thereto defendants by their counsel, objected, which objection was overruled, to which ruling of the court, defendants excepted, at the time, all of which will more fully appear on page 94 of the bill of exceptions, and which same is assigned for error.

Defendants further assign for error the action of the court in overruling the objection of the defendants, and their motion to strike out the various questions put to the witness Hill, and excepted to at the time, as appears on page 95 of the bill of exceptions, wherein he is asked concerning Mr. Reilley's place of business and the further question as to the "room above Mr. Reilley's, what kind of a room is that you speak of you have seen Mr. Edgar in," to which question he answered: "There is two rooms above the rear room, that is they front on the alley," to which question and answer the defendants objected, and the court overruling said objections, defendants then and there excepted.

And the defendants further assign as error the action of the court in refusing to sustain the objection to the question: "That room I am speaking of as occupied by Mr. Edgar—what is carried on or done in that room, if you know?"

And the action of the court to the further question: "What do you mean by drawing?" and the answer thereto: "It is a lot of numbers that are printed first, in an uneven way, then they are placed in a straight line in numerical order, that is the smallest first, then so on up," to which question and answer defendants objected, which objection was overruled and the defendants then and there excepted, all of which more fully appears on page 95, and is further assigned for error.

Defendants further assign for error the action of the court in overruling the objection of the defendants to the question, "Do you know what those articles and things that you have enumerated that you found in that office, were used for," as will more fully appear on page 96 of the bill of exceptions.

And defendants further assign for error the action of the court in overruling the objection of the defendants and their motion to strike out all that portion of the testimony as appears on page 96, with reference to what he saw and heard as occurring upon the —— day of February, 1900, to which ruling of the court defendants excepted at the time, and same is assigned for error.

Defendants further assign for error the action of the court in overruling the objection of the defendants to the question, "State, if you know, what Edgar's business or occupation was during the year 1899," as appears on page 97.

And defendants further assign for error the action of the court in overruling the objection of the defendants and their motion to strike out the answers to the various questions put to the witness, C. H. Woellner, on page 111 of the bill of exceptions, as was in answer to interrogatories by the court; the court overruled said motion, to which ruling of the court, defendants by their counsel, then and there excepted, and same is assigned for error.

Defendants further assign as error the action of the court in overruling the objection of the defendants to the question, "Did he give you instructions as to this particular class of telegrams brought in by Mr. Francis?" as appears on page 112, which objection was overruled, the defendants then and there excepted.

And to the further question, "These telegrams were brought in generally twice a day, were they not?" and the action of the court in overruling the defendants' objection thereto is assigned for error.

Defendants further assign as erorr the action of the court in refusing to give to the jury the special chargesand each of them asked by the defendants to be given by the court to the jury and refused by the court as follows:

Defendants further assign for error the action of the court in overruling the objection of the defendants to the question, "I will ask you if you have in your possession certain papers taken off of Anthony Hoff by chief of police upon the morning of October 4, 1899," as appears on page 113, to which ruling of the court defendants then and there excepted.

Defendants further assign as error the action of the court in admitting as evidence certain papers offered by the United States and marked "Exhibits 11 and 12" and to the reading of said Exhibits, counsel for defendants excepted at the time and to the further action of the court in admitting certain other papers offered and read in evidence and marked "Exhibits 13, 14 and 15," and attached

to the bill of exceptions, as will more fully appear on pages 115 and 116 thereof, to which action of the court, counsel for defendants excepted at the time and same is assigned for error.

And defendants further assign for error the action of the court in overruling the objection of the defendants to the question, "Do you know what business Mr. Reilley is in?" and the answer thereto, to which ruling of the court counsel for defendants excepted at the time, as will more fully appear on page 120 of the bill of exceptions.

Defendants further assign as error the action of the court in overruling the objection of the defendants to the question, "You may state what that was that you observed in his place of business," and the answer thereto, to which ruling of the court defendants then and there excepted as will appear on page 121 of the bill of exceptions.

And defendants further assign for error the action of the court in overruling the objection of the defendants and their motion to strike out the testimony of the witness, Lieut. John Poppe, to which refusal of the court so to do, and to which ruling of the court, counsel for defendants at the time excepted, as will more fully appear on page 122 of the bill of exceptions, and which same is assigned for error.

Defendants further assign for error the action of the court in overruling the objection of the defendants to the question as appears on page 125, "Do you remember an account kept at that time with S. T. Dixon & Co., or S. T. Dickerson & Co.?" to which ruling of the court defendants then and there excepted.

Defendants further assign for the error the action of the court in overruling the objection of the defendants to the question as appears on page 126, to wit: "Now, Mr. Page, it developes that Mr. Francis, one of the defendants in this case, has gone generally twice a day to the Western Union Telegraph office in this city and delivered certain papers, which the receiving clerks sent up stairs in the chute for transmission without reading, that those messages are charged for; will you please tell us in whose name the account is kept?" to which ruling of the court counsel for defendants excepted at the time, as will more fully appear on page 126 of the bill of exceptions.

Defendants further assign for error the action of the court in overruling the objection of the defendants to the question on page 128, to wit: "Haven't you a business knowledge that those things are done?" to which ruling of the court, defendants then and there excepted.

Defendants further assign for error the action of the court in overruling the objection of the defendants to the question: "By whom in October, along about the 1st of October of last year," to which ruling of the court the defendants excepted at the time, as will more fully appear on page 128 of the bill of exceptions.

And defendants further assign for error the action of the court in overruling the objection of the defendants to the question: "Well, from your business knowledge as manager of that concern," to which ruling of the court, defendants then and there excepted, and to the further action of the court in refusing to strike out the answer to the foregoing question, as appears on page 129 of the bill of exceptions, and which same is assigned for error.

And defendants further assign for error the action of the court in overruling the objection of the defendants and their motion to strike out the question and the answer thereto of the witness on page 130 of the record, to which ruling of the court defendants then and there excepted.

And defendants further assign for error the action of the court in overruling the objection of the defendants to the questions put to the witness, Charles Hirschman, relative to the signing of the bond, as appears on page 132 of the bill of exceptions, to which ruling of the court, counsel for defendants excepted at the time.

And defendants further assign for error the action of the court in overruling the objection of the defendants to the various questions put to the witness, F. S. Kyle, as appears on page 133 of the bill of exceptions, to which ruling of the court defendants excepted at the time.

And defendants further assign for erorr the action of the court in refusing to strike out the testimony of the witness, F. S. Kyle, as requested by the defendants and same is assigned for error.

And defendants further assign for error the action of the court in overruling the objection of the defendants and their motion to strike out the answers to the various questions put to the witness, J. T. Frazier, as was in answers to interrogatories by the court, to which ruling of the court, defendants then and there excepted and assign same for error.

And to the further action of the court in refusing to grant the further motion of the defendants to strike out and exclude the testimony of the witness, J. T. Frazier, is assigned for error.

Defendants further assign for error the action of the court in overruling the objection of the defendants to the

admission of the bond offered in evidence and marked "Exhibit No. 17," to which ruling of the court defendants excepted at the time.

Defendants further assigns for error the action of the court in overruling their motion to strike out and exclude the testimony of William E. Bundy, to which ruling of the court defendant excepted at the time.

Defendants further assign for error the action of the court in overruling the objection of the defendant to the question put to A. L. France, relative to the "kind of tickets or slips used when you were in the business," to which ruling of the court, defendants then and there excepted.

And to the further question, "As far as the player is concerned, what does that represent to the player," to which the defendants objected, which objection was overruled by the court, to which the defendants then and there excepted, and same is assigned for error.

And defendants further assign for error the action of the court in overruling the objection of the defendants to the question, "What was the ticket good for," and the answer thereto, to which ruling of the court defendants excepted at the time.

Defendants further assign for error the action of the court in overruling the objection of the defendants to the question "I hand you a book, Mr. Francis, tell the jury what that book is," to which ruling of the court, defendants excepted at the time.

And defendants further assign for error the action of the court in overruling the objection of the defendants to the questions put to the witness, Francis, concerning the Room 64, to which ruling of the court defendants by their counsel excepted at the time.

And the further action of the court in overruling the objection of the defendants to the admission of said check book as evidence, which same is marked "Exhibit —" and attached to the bill of exceptions, to which ruling of the court defendants excepted at the time, and same is assigned as error.

And defendants further assign as error the action of the court in stating that papers submitted by Mr. Page, would be admissible if properly identified, to which ruling of the court defendant excepted at the time.

Defendants further assign for error the action of the court in overruling the objection of the defendants and their motion to strike out the testimony of the witness, Francis, to which ruling of the court defendants at the time excepted.

Defendants further assign for error the action of the court in overruling the objection of the defendants to the question put to the witness, William Fellows: "Is it, or is it not, unusual that seventy telegrams in cipher, and of this description should come up at certain hours, for transmission each day," and the answer thereto, to which ruling of the court defendants excepted at the time.

And defendants further assign for error the action of the court in overruling the objection of the defendants to the further question: "Don't you know as a matter of fact that these are policy telegrams," to which ruling the defendants excepted at the time.

And the action of the court in overruling the further objections of the defendants to questions relative to telegrams, and the answers thereto by the witness, William Fellows, is further assigned for error.

Defendants further assign for error the action of the court in overruling the objection of the defendants and their motion to strike out the testimony of the witness, William Fellows, to which ruling of the court, defendants at the time excepted.

Defendants further assign for error the action of the court in overruling the objection of the defendants to the question put to A. L. France, upon being recalled, with reference to the raid at the St. Paul building, and what the witness saw on that day, to which ruling of the court defendants then and there excepted.

And the action of the court in overruling the objection of the defendants to the question "Who is Ben Holland," to which ruling the defendants excepted at the time and same is assigned for error.

Defendants further assign for error the action of the court in overruling the objection of the defendants to the question "Who is Mr. Spencer," and the answer thereto, to which ruling of the court defendants then and there excepted.

Defendants further assign as error the action of the court in overruling the objection of the defendants to the question: "Now, Mr. France, I will hand you telegrams, what is purporting to be telegrams, sent by the Western Union Co., of date of October 2, 3, 4, 5 and 6th. I will hand you these of October 4th. You may take these telegrams and examine them and explain to the jury what they are, if you know," to which ruling of the court defendants excepted at the time.

And defendants further assign for error the action of the court in overruling the objection of the defendants to the answer to the foregoing question, to which ruling

of the court the defendants excepted at the time.

Defendants further assign for error the action of the court in overruling the objection of the defendants to the question "Right there I desire to call your attention, before proceeding further. State if telegrams sent to New York City the cipher was any material difference between those sent to other places," to which ruling of the court defendants then and there excepted.

Defendants further assign for error the action of the court in overruling the objection of the defendants to the question: "Now, turn to the telegrams, if you can find them, from New York and see if they have the third check word on those," to which ruling of the court the defendants excepted at the time.

Defendants further assign for error the action of the court in overruling the objection of the defendants to the question: "Explain the address, if you can, upon those New York telegrams," to which ruling of the court defendants excepted at the time.

Defendants further assign for error the action of the court in overruling the objection of the defendants to the question "I will hand you telegrams on the 2nd, 3rd, 4th, 5th and 6th, and ask you to look at these and say if these are telegrams—I will hand you the package of the fourth and ask you to look at those and see if these are packages that you took out of these envelopes and placed upon the books," to which ruling of the court defendants, by their counsel, then and there excepted.

Defendants further assign as error the action of the court in overruling the objection of the defendants to the question "Why are you not supposed to put a check upon telegrams like that," to which ruling of the court defendants then and there excepted.

Defendants further assign for error the action of the court in overruling the objection of the defendants and their motion to strike out the testimony of the witness, Philip Emig, to which ruling of the court defendant excepted at the time.

Defendants further assign for error the action of the court in overruling the objection of the defendants to the admission of certain telegrams referred to in the testimony of Philip Emig, offered in evidence by counsel for the government and marked "Exhibit 18," to which ruling of the court, defendants, by their counsel, excepted at the time.

And the defendants further assign for error the refusal of the court to give the following special instructions, excepted to at the time.

Before the defendants, or any of them, can be convicted under the indictment with which they stand charged the government must satisfy you beyond a reasonable doubt of two things, viz.:

First, that on or about the 4th day of October, 1899, in the County of Hamilton, and State of Ohio, and within the jurisdiction of this court, two or more of the defendants did then and there unlawfully, knowingly and feloniously conspire together to commit an offense against the laws of the United States by conspiring to cause to be carried from Newport, in the State of Kentucky, to Cincinnati, in the State of Ohio, certain papers, certificates and instruments purporting to be and to represent chances, shares and interests in prizes which by lot and chance might be awarded to persons who might select the numbers which by lot and chance should be included in the twelve numbers drawn and selected at the drawings of the so-called Kentucky lottery and the so-called Henry Lottery, or either of them, enterprises offering prizes dependent upon lot and chance or commonly known as policy and consisting in the drawing and selection by lot and chance at stated intervals of twelve of the numbers from one to seventy-eight, inclusive, and of awarding prizes in varying amounts to those who may have prior to the time of any one of the drawings and selections as aforesaid, upon the payment of a small sum of money, select various combinations of numbers included in the said twelve numbers thereafter at said drawings drawn and selected by lot and chance as aforesaid; and

Second, that Charles W. Reilley, John Francis, Anthony Hoff and John Edgar, or either of them, to effect the object of such conspiracy, if you should find such conspiracy to have been entered into, at or about the time and place and for the purposes aforesaid, unlawfully, knowingly and feloniously cause to be carried from Newport, in the State of Kentucky, to Cincinnati, in the State of Ohio, papers, certificates or instruments representing chances or interests in either of the lotteries aforesaid as alleged in this indictment.

2.

I charge you that the papers, certificates or instruments, purporting to be or representing chances or interests in lotteries to which the indictment in this case refers must, in order to convict the defendants or either of them, be shown to have been papers, certificates or instruments in some drawing or drawings thereafter to

take place, and not papers, certificates or instruments in some drawing or drawings, or either of said lotteries which had already taken place.

3

I further charge you that the conspiracy alleged in the indictment of conspiring to cause to be carried from one State to another, to wit: from Newport, in the State of Kentucky, to Cincinnati, in the State of Ohio, certificates and instruments representing or purporting to represent chances, shares, or interests in the said lottery must be shown to be for the purpose of disposing of such papers, certificates and instruments, and such purpose can not be inferred, must be proved, like any other fact, by testimony which shall so satisfy you beyond a reasonable doubt.

4.

The failure of any of the defendants to take the stand in his own behalf must not be considered by you in the least degree as evidence of guilt, and you must not allow such fact to weigh in your judgment in determining the guilt or innocence of the defendants or either of them.

5.

I charge you that the act under which the defendants stand indicted, in so far as it attempts to prohibit the carrying from one State to another of papers, certificates and instruments purporting to be or representing a ticket, chance, share or interest in or dependent upon the event of a lottery or similar enterprise offering prizes dependent upon lot or chance, is unconstitutional and void, and your verdict therefore must be for the defendants.

6.

If the facts tending to show guilt may fairly be reconciled with innocence, then I charge you a reasonable doubt may be considered to exist.

5a.

I charge you that any paper, certificate or instrument which purports to be or represents to be a ticket, chance, share or interest in or dependent upon the event of a lottery or similar enterprise offering prizes dependent upon lot or chance must be such paper, certificate, or instrument as upon its face purports to entitle the holder thereof to a chance, share or interest in any so-called

lottery or similar enterprise offering prizes dependent upon lot or chance, and the mere carrying of papers, instruments or certificates showing the result of a lottery or similar enterprise which has already been drawn, and it is not sufficient that numbers were placed upon a slip of paper offering to bet upon a future drawing, or is not an interest in or dependent upon the event of a lottery or chance coming within the meaning of the statute as defined under the Act of March 2, 1895, 28 Statutes at Large, p. 963; and therefore, if you find that the so-called papers, instruments or certificates charged in the indictment against the defendants to have been caused to have been carried from Newport, in the State of Kentucky, to Cincinnati, in the State of Ohio, was of the kind herein mentioned, your verdict should be not guilty.

5b.

I charge you that any paper, certificate or instrument which purports to be or represents a ticket, chance, share or interest in or dependent upon the event of a lottery or similar enterprise offering prizes dependent upon lot or chance must be such papers, certificate, or instrument as upon its face purports to entitle the holder thereof to a chance, share or interest in any so-called lottery or similar enterprise offering prizes dependent upon lot or chance, and the mere carrying of papers, instruments or certificates showing the result of a lottery or similar enterprise which has already been drawn and which event has already taken place is not such a ticket, chance, share or interest in or dependent upon the event of a lottery or similar enterprise offering prizes dependent upon lot or chance coming within the meaning of the statute as defined under the Act of March 2, 1895, 28 Statutes at Large, p. 963; and therefore, if you find that the so-called papers, instruments or certificates charged in the indictment against the defendants to have been caused to have been carried from Newport, in the State of Kentucky, to Cincinnati, in the State of Ohio, in pursuance of a conspiracy, do not upon their face represent a ticket, chance, share *or interest* in or dependent upon the event of a lottery or similar enterprise offering prizes dependent upon lot or chance, or if said alleged papers, certificates or instruments purporting to be or represent a share, chance, or interest in or dependent upon the event of a lottery or similar enterprise offering prizes dependent upon lot or chance are such papers, certificates, or instruments of a lottery which prior to the time alleged of being carried as aforesaid, had already been drawn, then in that case

I charge you that said so-called papers, instruments or certificates are not such as are forbidden to be carried within the meaning of said statute.

7.

The proof must show it to be the act of two or more, that is, it must be a joint act, in order to constitute the crime charged.

8.

I charge you, as a matter of law, that the mere passive cognizance of the illegal action of others, is not sufficient to show a conspiracy. An active participation is necessary in order to constitute the guilt of a defendant.

9.

In order to establish a conspiracy it is necessary that the jury should find from the proof adduced that at least two persons engaged in it; that is two persons named in the indictment did unlawfully conspire to do the unlawful act charged, for it is manifest that while one person may resolve to do an unlawful, may form the purpose and determination to do the unlawful act, it is impossible that such person can conspire with himself; there must be some other person conspiring with such person, and in this case it must be proved that it was at least a conspiracy entered into between two of the defendants named in the indictment and that some overt act was done in the County of Hamilton, State of Ohio, in furtherance thereof.

10.

I charge the jury, as a matter of law, that before they can find the defendants or either of them guilty of the offense charged in the indictment, that it must be proven beyond a reasonable doubt;

First, That the defendants, or at least two of them, entered into a conspiracy to do the act complained of in this indictment.

Second, That said conspiracy was entered into in the County of Hamilton as alleged in this indictment.

If the proof adduced fails to satisfy the jury as to the existence of either of the foregoing elements, then your verdict must be not guilty.

11.

The fact that the said H. T. Harrison did write certain numbers upon a slip of paper to be played in lottery or

similar enterprise, does not make the same a ticket representing an interest, share or chance in a lottery or similar enterprise dependent upon the event of a lottery dependent upon lot or chance.

12.

John Francis moves the court to charge the jury that the verdict of the jury should be for him and not guilty.

13.

Charles W. Reilley moves the court to charge the jury that as to him the United States has failed to make a case, and that the verdict of the jury should be in his favor.

14.

John Edgar moves the court to charge the jury that as to him the verdict of the jury should be not guilty under each and every count of the indictment.

15.

I charge you, as a matter of law, from the facts proven that the defendants should go acquit, because there is no legal and valid proof that an offense of conspiracy was committed within the jurisdiction of this court.

16.

The jury finds that the facts tending to show guilt upon the part of the defendants may fairly be reconciled with his innocence. I charge you that then a reasonable doubt does exist and the jury should acquit such persons.

17.

If any member of the jury has a reasonable doubt as to the guilt of any person accused, it is his duty to withhold his assent to a verdict of guilty such doubt remains in his mind.

It is a well settled rule of law in criminal cases, where *the proof* adduced is circumstantial, that while they may tend to show streng evidence of guilt, yet, *if they are not* inconsistent with the innocence of the defendants, the jury should acquit.

18.

The law presumes every man innocent until he is proven guilty and this presumption continues until removed by proof which satisfies the jury beyond a reasonable doubt.

19.

The jury must find from the testimony adduced that a conspiracy was entered into and the acts done in the County of Hamilton, within the jurisdiction of this court, as alleged in the indictment, or else they must acquit the defendants.

20

If the jury find that the person named in the indictment, viz., H. T. Harrison, desiring or intending to play policy wrote out a list of numbers and requested the defendant, Anthony Hoff to send said numbers so as aforesaid written by him to be sent over the river to be played in policy and that he, the said Hoff, gave the said paper containing the numbers to defendant Edgar at Newport, in the State of Kentucky, to be carried by him over the river and played in policy, then I charge you there is a variance as between the proof and the allegations of this indictment, and your verdict should be not guilty; and there was no proof adduced that said numbers had been played, then I charge you that your verdict should be not guilty.

21

The fact that the defendants or either of them may have committed an unlawful act, to wit, carrying tickets or other papers purporting to represent a share, chance or interest in a lottery, policy or scheme or chance, is not sufficient to warrant a verdict of guilty; it must be proved beyond a reasonable doubt that at least two of the defendants confederated or agreed to do the unlawful act in furtherance thereof and that the conspiring was to carry tickets or other instruments representing a share or interest in the lottery or scheme of chance from Newport in the State of Kentucky, to Cincinnati, in the State of Ohio.

22

A criminal conspiracy consists not merely in the intention of two or more to do an unlawful act, but the gist of the offense is the mutual agreement of the two or more to do the unlawful act in the manner and by the means set forth in the indictment, and some overt act in furtherance thereof.

23

The fact that the defendants may each or all of them have been engaged in the policy business does not of itself warrant the jury finding them guilty as charged, for if

the jury find that each acted for himself—that is without an agreement or confederation to do the unlawful act with the other—then I charge you under this indictment your verdict must be not guilty.

24

The jury must be satisfied beyond a reasonable doubt that each and every element of the crime charged has been proven before they can find a verdict of guilty. If the jury have a reasonable doubt as to the guilt of any defendant, they must solve that doubt in favor of such defendant and acquit him.

26

The credibility of each and every witness is peculiarly for the jury; the weight to be given the testimony of any witness offered in this case must be determined by the jury.

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Defendants further assign as error the action of the court in charging the jury as follows:

"Congress upon the second day of March, 1895, passed an Act, called the Anti-Lottery Act, which reads, so far as it concerns this case, as follows:

"Any person, who shall cause to be carried from one state to another, in the United States, any paper, certificate or instrument, purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of a lottery, or similar enterprise, offering prizes, dependent upon lot or chance, shall be punishable, &c."

Section 5440 of the Revised Statutes of the United States, declares that if two or more persons conspire to commit any offense against the United States, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy, shall be liable to a penalty, &c.

This indictment in this case, in substance, charges that in this district, on the fourth day of October, 1899, the defendants Charles W. *Reilley*, John Francis, Anthony Hoff and John Edgar, alias Peter Edgar, did unlawfully conspire to cause to be carried from the City of Newport, in the State of Kentucky, to the City of Cincinnati, in the State of Ohio, certain papers, purporting as they well knew to represent interests, dependent upon the event of a lottery, offering prizes, dependent upon chance, and that to effect the object of the conspiracy,

they did cause to be carried from the City of Newport, in the State of Kentucky, to the City of Cincinnati, in the State of Ohio, five papers, purporting, as they well knew, to represent the interest of H. T. Harrison and other persons in prizes or sums of money, which, by lot or chance might thereafter be awarded to players in the next drawing of the lottery. Copies of the papers are set forth in the indictment.

It appears from the indictment, that the lottery in question, belongs to a variety known as policy, and the scheme and manner of playing it is as follows:

Of the numbers from one to seventy-eight, the players select such as they may choose, and upon the payment of a small sum of money, these numbers so chosen, are written on small pieces of paper in duplicate, either by the player or the agent of the lottery, who receives the money. One copy of these numbers is kept by the player and the other by the agent, and these papers represent the interest or chance which the player has taken in the drawings which is afterwards to take place. The drawing consists in the selection by lot or chance of twelve of the numbers from one to seventy-eight, inclusive, and prizes in varying amounts, are awarded to the players, whose choice of numbers are found in the twelve selected at the drawing.

As for instance, if one of the players should select the numbers two, twenty and seventy-eight, and these are found among the twelve selected by chance at the drawing, the player is entitled to receive a prize or sum of money. Agencies for policy shops are established, where the players may make selection of numbers—make bets—and the paper or writing, evidencing the bet, held by the agent, is forwarded by a carrier to headquarters, as it is called, before the drawing takes place, to enable those conducting the drawing to know what players have won, and who are entitled to the prizes, or sums of money that are paid to the betters who win. After the drawing takes place what are called official prints, are made out, showing in one line the twelve winning numbers, in the order in which they were drawn or selected and in a line below the same numbers in their numerical order.

These official prints are forwarded to the policy shops, or agencies, for the information of the players.

A man who has taken a chance wants to know the result of a drawing and he is informed by the headquarters sending to these shops or agencies these so called official prints which show what the winning numbers are, and he can see whether his choice of numbers is among the win-

ning numbers—whether he has won, or whether he has lost. The prizes, or the sums won, are also delivered through these agencies to the successful players the drawings are made twice a day, one at twelve o'clock noon, and one at five o'clock in the afternoon.

Now the government charges that these defendants conspired to cause the tickets, or evidences of the bet, set forth in the indictment to be carried from the City of Newport, in the State of Kentucky, to the City of Cincinnati, in the State of Ohio, in time for the drawings and that to effect the object of this conspiracy, the defendants, did in fact cause these papers and tickets to be so carried.

Defendants further assign as error the action of the court in charging the jury as follows:

Now, in the first place, gentlemen, what, in law, constitutes a conspiracy? The Supreme Court of the United States has described it as, "A combination of two or more persons, by concerted action, to accomplish a criminal or unlawful, by criminal or unlawful means." A combination of persons who intend to and by concerted action, do accomplish an unlawful or criminal act, or some act which may not be unlawful in itself, but accomplished by the use of unlawful or criminal means.

As I have said, the charge herein, that these defendants conspired, agreed together, to do a criminal act to wit, to carry lottery tickets, from one state to another which is forbidden by the Act which I have read in your hearing, and that in order to accomplish this undertaking on their part, this conspiracy, in order to effect it, they actually did carry such tickets, lottery tickets, from the State of Kentucky over into the State of Ohio, because under the Statutes of the United States, there must be not only a conspiracy an agreement to do an unlawful or criminal act, but there must be some step taken in the execution of it, in the language of the statute, "some act, by one or more of the conspirators to effect the object of the conspiracy."

In the first place then, was there, about the time mentioned in the indictment, a combination of persons, engaged by concerted action, in carrying on a lottery, known as policy, which offered prizes to his patrons dependent upon lot or chance, and was it a *part of the* operation of the scheme, to cause to be carried from the city of Newport in the State of Kentucky, to the City of Cincinnati, in the State of Ohio, papers, purporting to represent tickets, chances, shares or interests in and dependent upon the drawings of the lottery thereafter to be made?

Second. Were these defendants parties to this combination? And third, was any act done by one or more of the parties to the combination to effect the conspiracy —to effect the carrying of the papers?

Was there then such a combination—a combination to carry on a lottery, and as a means, to carry lottery tickets from Kentucky to Ohio—as one of the features of the operation of the lottery, to carry tickets from Kentucky to Ohio? Was there such a combination at or about the time charged in the indictment? If there was, and you are to determine the fact from the evidence, then your next inquiry will be, were these defendants on trial here parties to that combination? And if they were, did one of them or more than one do an act to effect, to accomplish the conspiracy?

Defendants further assign as error the action of the court in charging the jury as follows:

In cases of conspiracy, it is seldom that what is called direct evidence can be adduced to establish its existence Men who combine together to commit crime, do not publish the conspiracy to the world, nor put it in writing, nor recite its terms in the presence of witnesses, and therefore, it has been found necessary to resort to those facts and circumstances that attend the transaction of the commission of the alleged crime, in order to ascertain whether such a conspiracy was formed and existed. There is no mystery about what is called circumstantial evidence. Your conduct and your actions every day of your lives are influenced by the inferences which you draw from facts and circumstances that are presented to your minds in matters about which you are called upon to act. If A is charged with stealing a five dollar greenback bill and B saw him steal it, and so testifies, that is direct evidence of the fact necessary to be found in order to convict him, but if a five dollar bill is missing, a five dollar bill with a given number is missing and A is seen in the vicinity about that time, and he is afterwards arrested and accused of the theft, and denies it, and is then searched, and they find the bill in his pocket with the identical number upon it, the jury, in such a case, would be warranted in inferring that A took that five dollar bill, and that he took it with the mind of a thief, intending to appropriate it to his own use and deprive the owner of it. And these facts, the fact that the bill was missing, that A was found in the vicinity, that he was arrested, that he was charged with the theft, that he denied it that he was searched and the bill was found upon

him, are as satisfactory and conclusive as the statement of the witness who saw him take it. In one case you have the direct evidence of an eye witness, in the other you have facts and circumstances, which justify and require you to infer that A was the guilty person.

In this case, therefore, the government has put before you many facts and circumstances, which it asks you to consider and drawing from them the proper inferences, to determine, whether these defendants are or are not guilty of the offense with which they stand charged. Now, you are to consider these facts and circumstances and determine whether a lottery was being carried on here, about the time stated in the indictment, which had, as one of its essential features, the carrying of lottery tickets from Kentucky to Ohio. And if the evidence, the facts and circumstances put before you, satisfy you that such a lottery was being carried on, then you will turn to the same facts and circumstances, the facts and circumstances presented to you in the evidence, and determine whether these defendants were parties to a combination and conspiracy engaged in carrying on that lottery, with that interstate feature. And I will say here in passing, gentlemen, that it is your function to determine what the facts in the case are, and it is the function of the court to determine what the law is. When you receive the law from the court and apply it to the facts as you find them, then you are to determine, as the result of the application of the law to the facts, whether the defendants, or any of them, are guilty of the crime charged. The responsibility for the determination of the facts rests upon you, not upon the court, and in calling attention to the testimony in the case the court does not do it with any purpose to influence your action, because you are under oath to perform your part of the duty here, and are responsible for it.

Defendants further assign as error the action of the court in charging the jury as follows:

Now, as to the defendant, Hoff, there is testimony which I will not undertake to recapitulate fully, but refer to in a general way tending to show that he kept a barber shop in Newport, Kentucky; that Harrison, one of the witnesses for the government, called there on the 1st, 2nd, 3rd and 4th days of October and made bets. On the 4th—if I am mistaken about it the jury will correct me—on the 4th he took half of an envelope and on the inside wrote down in duplicate his choice of numbers, tore it into and kept one piece containing the num-

bers that he had chosen and gave the other piece to Hoff, containing these same numbers, and paid Hoff a sum of money; in other words, he made a bet or play, as he called it, in the lottery to be drawn that day; that shortly afterwards, the defendant, Edgar, came to Hoff's shop, and then started across the bridge to Ohio, and at the Ohio end of the bridge was arrested by officers of the Cincinnati police force and searched, and upon his person was found the ticket, the half of this piece of the envelope, containing the numbers chosen by Harrison, which had been left with Hoff, and four other pieces of paper containing numbers, and that Hoff was arrested the same day, I believe—you will remember that—and that in his possession were found similar pieces of paper containing numbers in manner, like this, and copies of official prints and other papers which have been exhibited before you, and which you will have with you in the jury room. And upon these facts and circumstances thus shown by the evidence offered by the government, the government claims that he was the agent of the lottery company; that he is what is called a vendor, an agent to receive bets and transmit them to headquarters in time for the drawing. Now, it is for you, upon this testimony, to say whether he was an agent for the lottery company for that purpose.

And upon the same evidence, it is claimed that Edgar was a carrier for the company—for the lottery company. And it is claimed also, upon this same testimony, that these two men were in combination; that they were acting together; that one was receiving bets and the other, in playing his part, was coming there to get them and carry them over to headquarters. Now, it is for you, upon this evidence, to say whether that is true or not.

As to the defendant, Reilley, they say that he was in charge of a place on Sixth Street in this city, 116, I believe, you will remember, and that Edgar was traced from Hoff's place in Kentucky across the bridge to his place on Sixth Street a number of times, and that at one time, when the place was raided, he, Reilley, was found there with paraphernalia, which it was claimed belongs to the operation of a lottery, and you will remember what was found there, official prints and papers of that character.

I am not undertaking to repeat the testimony to you. Because I depend upon you to repeat it. And the government claims that he represented this end of the line, and that he was acting in concert with the other two. Now, it is for you to say what the fact is. When a draw-

ing has been made, the patrons are to be notified of the result of the drawings, and, it is said, that the drawings are conducted in the St. Paul Building, supervised by the defendant, Francis. That is the claim that is made, and that he carried telegrams after the drawing to the telegraph office and sent the information to the players to the different parts of the country. That is the claim of the government upon the evidence offered, in order to show that he was in concert with the other three. Now, you must remember the evidence as to the defendant, Francis. It is for you to determine what his relation to the transaction was. If there was such a conspiracy, whether he was one of the parties to it. The evidence tended to show this, that he went to the telegraph office every day about twelve o'clock and about five o'clock, and it finally came out through two of the receivers of the telegraph office that he brought packages of some kind. Woellner, and the next witness both said, both testified, that he did not hand them anything, but when asked whether he brought anything there that came into their possession as receivers of the company, whether he handed it to them or not, both witnesses, as I remember the testimony, testified that he did. And then these witnesses, as I remember their testimony, said that packages were sent up the tube to the operating room. You have the testimony of the little boy who attended the dummy or tube, as it was called, and received the matter that came up from below and opened it and put it upon wires—distributed it upon the wires in front of the different operators who sent it out.

Telegrams covering the time from the 1st or 2nd of October, I am not certain which, to the 6th, were introduced in evidence. Telegrams for one day were displayed before the jury. They were in cipher. No one has been able to tell the jury what the contents of these dispatches were, but you will remember what France, who was formerly engaged in this business, said about them—what the character of the telegrams was and the purpose. No witness has testified that Francis walked into the telegraph office and laid down on the counter a telegram and said, "Here is a lottery telegram that I am sending to New York to tell the people there the result of the drawing to-day"; nobody has testified to anything of that kind, but the government has put before you these facts and circumstances, to which I have alluded in a general way. Just exactly what these facts and circumstances show, you must determine, gentlemen, not the court. When you have recalled them and have them in

your mind, then it is for you to say whether they show the connection of this defendant, Francis, with this alleged combination as claimed by the government, if they do, if you are satisfied from the facts and circumstances put in evidence, that these four men were connected with this combination, this alleged conspiracy, that they were working together, each playing his part, then the next step is to determine whether there was some act done in furtherance of the conspiracy. But, before passing to that, I should say to the jury, that in order to find these defendants parties to the conspiracy charged, the evidence must show that they knew what they were doing, they must have intended to carry on the lottery—they must have intended, in furtherance of the carrying on of the lottery, to carry tickets from Kentucky to Ohio. A man innocently drawn into a transaction of that kind, who play a part without any knowledge of its purpose or object, has no guilty intent that makes him a party. And at this point I will say, too, that it is not necessary that a man engaged in such combination, should know every other man in the combination or the part he plays. If he knows there is a combination to do an unlawful act, to commit a crime and that he has a part in it to play, and that there others playing parts, and that others must play parts in order to accomplish the purposes of the conspiracy, he is as guilty as if he knew the name and had personal acquaintance with every one connected with the conspiracy—as if he knew precisely the part that every other man played. In a combination in which the co-operation of many members is necessary, covering a large field of territory, it would be impossible almost that each should know every other and the part he plays. It is only necessary that he should know that there is a combination, of which he is a part, for the purpose of accomplishing a crime. If, then, there was such a conspiracy as the indictment charges, and if these defendants were parties to it, then the next question is, whether any act was done to effect it? But, before passing to that, there is some other matters I desire to call your attention to. Did these paper or so-called lottery tickets, which it is alleged defendants conspired to carry from Kentucky to Ohio, purport to represent interests of players in a drawing afterwards to take place? It is not necessary, gentlemen, that they should purport or show upon their face that they were tickets in a lottery giving an interest to the holder, in a drawing afterwards to take place, but their purport may be shown outside of the papers. Now, as to the evidence offered by the government upon that

point, you will recall the evidence of France, who was introduced as an expert, to tell what they were, and the evidence of Harrison that he wrote out his ticket and delivered one-half of it to the agent, paid the money and held the duplicate—one of the duplicates, his evidence of the interest he had in the drawing that was to come off that day, and the evidence to which I have before referred as to the fact that the duplicate left with Hoff was afterwards found in the possession of Edgar at the end of the bridge shortly after the play was made. If, from these facts, you are satisfied that it represented an interest in a drawing afterwards to take place, then within the meaning of the law, it purported to represent the interest of the player in the drawing, although it did not so state upon its face.

Defendants further assign as error the action of the court in charging the jury as follows:

Now, then, to come to the act, which it is alleged was done in furtherance of this conspiracy, it is said that five tickets, copies of which are set forth in the indictment, were, in fact, carried across the bridge from Newport, Kentucky, to Cincinnati, Ohio. That was an act to effect the purpose and object of the conspiracy. And if the jury, upon this evidence, should find that Edgar was a party to the alleged conspiracy, and carried these tickets, including the Harrison ticket, over the bridge from Kentucky to Ohio, then I charge you that it would be an act in furtherance of the conspiracy, and it would be the act not only of Edgar, but of all the defendants, that is, if you find these four parties, these four defendants, were parties to the conspiracy charged in the indictment to carry tickets across the bridge into Ohio, and that Edgar, one of them, did carry them over for the purposes of the lottery, in pursuance of that understanding among them, then his act was the act of all four—the act of all.

Defendants further assign as error the action of the court in charging the jury as follows:

It is necessary, gentlemen, that it should be established by the government that the crime charged here was committed in this District, that is, in the County of Hamilton and State of Ohio—in the Southern District of the State of Ohio, in the Sixth Judicial District of the United States. I charge you as the law of the case that if you find that these men were parties to the conspiracy charged, and in furtherance of it, carried the tickets across the bridge into the State of Ohio, then you will be warranted in finding that the offense was committed in Hamilton County, State of Ohio, within the jurisdiction of this court.

Defendants further assign as error the action of the court in charging the jury as follows:

When a man is charged with a crime, gentlemen, and placed on trial, the presumption of law is that he is innocent, and before the jury would be warranted in finding him guilty of the charge, upon which he is tried, the prosecution must establish his guilt beyond a reasonable doubt. I have recited in your hearing the elements constituting the charge in this case. Each element is essential to the charge. These elements of the charge must be established, beyond a reasonable doubt, in order to warrant a conviction.

Defendants further assign as error the action of the court in charging the jury as follows:

A reasonable doubt, as I have occasion to tell you before, is just what the words imply, a reasonable doubt, not an unreasonable doubt. In the practical administration of justice, it is impossible to remove all doubt of the guilt of the accused; it would simply defeat the end of justice to require anything of that kind. The law intends and it only requires that you should be satisfied beyond a reasonable doubt, not that you should be satisfied beyond all doubt. And the doubt which should be resolved in favor of the accused, is such a one as has reason for its foundation, one that would cause you in a matter of importance to yourselves to pause and hesitate before acting. You would not pause or hesitate because some slight, trivial doubt entered your mind, sometimes, I suppose there is a temptation excited by sympathy to yield to doubt to avoid the rendition of a disagreeable verdict. Gentlemen, that would not be a reasonable doubt, because the jury, as part of the machinery for the administration of justice, should do its duty honestly and fearlessly without fear or favor. It ought not to shirk a clear duty because of suggested doubt that had not reason to support.

Defendants further assign as error the action of the court in charging the jury as follows:

Gentlemen, as I have told you many times, you are the sole judges of the credibility of the witnesses brought before you, and it is for you to determine what weight the evidence of any witness shall have in your consideration of the case. I have had occasion to direct your attention to the circumstances which jurors should take into the account, and which men, involuntarily take into the account, in passing upon the credibility of a witness, and in determining whether a given witness is worthy of belief, whether the story he tells is true, or whether it is

true in part and false in part, and I do not feel that I need to spend time to recapitulate to you all the various circumstances which go to support or impeach the credibility of a witness. In passing on the testimony of a witness, you will consider his manner, his bearing, the story he tells, his intelligence, his prejudice, his disinterestedness, his honesty, his frankness, his disposition to be fair and other indescribable evidence of truth or falsehood, which every man sees and appreciates, and which, whether you realize it or not, enters into your mind, notwithstanding, and controls your judgment in determining whether a witness is credible and what weight his testimony should have. A witness may be perfectly honest and perfectly truthful, and you may reach that conclusion, yet he may have a very defective memory, he may greatly lack in intelligence, and the weight that you will give to his testimony will not be such as you would give to that of an intelligent witness, with a clear, retentive memory. I am not making application, in anything that I am saying, to any witness in the case; I am simply discussing the matter in a general way to invite your attention to those circumstances which should be considered in determining the credibility of a witness and the weight which should be given to the story which he tells.

The government must make out its case, and the fact that the defendants in this case have failed to testify is not to be taken into the account against them. Without reference to whether they have testified or not, leaving that entirely out of view, you are to take up the testimony which the government has introduced here and say whether it satisfies you with that certainty which the law require that they are or are not guilty of the offense charged.

Accordingly, as you find the facts, you may find all the defendants guilty, or you may find one or more guilty and others not guilty. Your verdict as to each will be determined by the facts as you find them. Each man's case is to be considered separately, and you are to find and determine whether they are all not guilty, or whether they are all guilty, or whether some of them are guilty, and some are not guilty; but it must appear that at least two persons conspired together. A man can not conspire with himself. There must be at least two.

Now, gentlemen, when you retire to your room, inquire first whether about the time charged in this indictment, and in this District, there was a combination of persons, carrying on a lottery, in violation of the Act of Congress, to which I have called your attention, by carry-

ing lottery tickets from Kentucky to Ohio. And if you find there was no such combination of persons acting together for such purpose that will be the end of the case, and your verdict should be not guilty. But if you find there was such a combination of persons, then let your next inquiry be as to whether these defendants, or any of them, were parties to that combination; were they taking part in it; were they playing parts in this unlawful combination, to carry lottery tickets from Kentucky to Ohio?

Defendants further assign as error the action of the court in charging the jury as follows:

But if you find they were, then the next question is, did anyone, in carrying out the common purpose, carry any lottery ticket, as I have explained that, from Kentucky to Ohio? If no one of them carried any tickets from Kentucky to Ohio, that is the end of the case, and your verdict should be not guilty as to all of them.

But if you find that one of them did carry tickets across the bridge from Kentucky into Ohio, having first found the other proposition to be true, then you will be warranted in returning a verdict of guilty, as against all, or such of them as you find to be guilty.

The action of the court in overruling the motion for a new trial, filed herein by Charles W. Reilley, for the reasons therein stated.

The action of the court in overruling the motion for a new trial, filed herein by John Francis, for the reasons stated therein.

The action of the court in overruling the motion for a new trial, filed herein by Anthony Hoff, for the reasons stated therein.

The action of the court in overruling the motion for a new trial, filed by Peter Edgar, for the reasons stated therein.

The action of the court in overruling the motion in arrest of judgment, filed by Charles W. Reilley, for the reasons stated therein.

The action of the court in overruling the motion in arrest of judgment, filed by John Francis, for the reasons stated therein.

The action of the court in overruling the motion in arrest of judgment, filed by Anthony Hoff, for the reasons stated therein.

16th. The action of the court in overruling the motion in arrest of judgment, filed by Peter Edgar, for the reasons stated therein.

17th. The action of the court in overruling the mo-

tion at the close of the testimony offered by the United States, as filed by Charles W. Reilley, requesting the court to direct the jury to acquit for the reasons therein stated.

18th. The action of the court in overruling the motion at the close of the testimony offered by the United States, as filed by John Francis, requesting the court to direct the jury to acquit, for the reasons therein stated.

19th. The action of the court in overruling the motion at the close of the testimony offered by the United States, as filed by Anthony Hoff, requesting the court to direct the jury to acquit, for the reasons therein stated.

20th. The action of the court in overruling the motion at the close of the testimony offered by the United States, as filed by Peter Edgar, requesting the court to direct the jury to acquit, for the reasons therein stated.

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And afterwards, to wit, on the 9th day of April, A. D. 1900, an entry was made upon the Journal of said court, clothed in the words and figures following, to wit:

Entry—Journal 7, Page 516.

Writ of Error Allowed and Bonds Fixed.

It being made to appear to the court that the defendants, Charles W. Reilley, John Francis, Anthony Hoff and John Edgar, alias Peter Edgar, have filed their petition for allowance of a writ of error and assignment of errors herein, and it being further made to appear to the court that the said defendants intend to prosecute said writ of error, it is ordered that the said writ of error be, and the same hereby is, allowed, and that the same operate as a supersedeas upon the said defendants giving bond with surety to the satisfaction of the clerk of this court as follows:

The said Charles W. Reilley in the sum of $3,000.00.

The said John Francis in the sum of $5,000.00.

The said Anthony Hoff in the sum of $2,000.00.

The said John, alias Peter Edgar, in the sum of $2,000.00.

To surrender themselves to perform the judgment of the court herein if said judgment should be affirmed upon said writ of error by the United States Circuit Court of Appeals of the Sixth Circuit.

And afterwards, to wit, on the 9th day of April, A. D. 1900, the following error bond was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Error Bond of Charles W. Reilley.

District Court of the United States, Southern District of Ohio, Western Division, ss.:

The United States

vs.

Charles W. Reilley.

Know all men by these presents:

That we, Charles W. Reilley, as principal, and John Donohue and Thomas C. McGrath and Thomas J. Mulvihill, as sureties, are held and firmly bound unto The United States of America, in the sum of three thousand dollars, to be paid to the said The United States of America. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 9th day of April, 1900.

Whereas, the above named Charles W. Reilley has taken out a writ of error to the Circuit Court of Appeals of the United States, Sixth Circuit, to reverse the judgment rendered in the above entitled action by the District Court of the United States for the Southern District of Ohio.

Now, therefore, the condition of this obligation is such, that if the above named Charles W. Reilley shall prosecute his said writ of error to effect and shall abide the decision of the said Circuit Court of Appeals of the United States, if he shall fail to make good his plea, then this obligation to be void; otherwise to remain in full force and virtue.

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|---|---|
| C. W. Reilley. | Seal. |
| John Donohue. | Seal. |
| Thos. C. McGrath. | Seal. |
| T. J. Mulvihill. | Seal. |

Sealed and delivered in presence of
Robt. C. Georgi.

The above security is approved.

A. C. Thompson,
District Judge of the United States, S. D. Ohio.

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Southern District of Ohio, ss.:

I, Thomas J. Mulvihill, one of the sureties above named, do solemnly swear that, after paying my just debts and liabilities, I am worth sixteen thousand dollars in real estate in my own name, situate in the County of Hamilton, in said District.

T. J. Mulvihill.

Sworn to before me the 10th day of April, 1900.
(Seal.) Robt. C. Georgi, Dep. Clerk,
U. S. District Court, S. D. O.

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Southern District of Ohio, ss.:

I, Thomas C. McGrath, one of the sureties above named, do solemnly swear that, after paying my just debts and liabilities, I am worth twenty-six thousand dollars in real estate in my own name, situate in the County of Hamilton, in said District.

Thos. C. McGrath.

Sworn to before me the 9th day of April, 1900.
(Seal.) Robt. C. Georgi, Dep. Clerk,
U. S. District Court, S. D. O.

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And afterwards, to wit, on the 9th day of April, A. D. 1900, the following error bond was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Error Bond of John Francis.

District Court of the United States, Southern District of Ohio, Western Division, ss.:

The United States,

vs.

John Francis.

Know all men by these presents, That we, John Francis, as principal, and John Donohue and Thomas C. Mc-

Grath and John J. Gilligan, as sureties, are held and firmly bound unto The United States of America, in the sum of five thousand dollars, to be paid to the said The United States of America. To which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals, dated this 9th day of April, 1900.

Whereas, the above named John Francis has taken out a writ of error to the Circuit Court of Appeals of the United States, Sixth Circuit, to reverse the judgment rendered in the above entitled action by the District Court of the United States for the Southern District of Ohio.

Now, therefore, the condition of this obligation is such, that if the above named John Francis shall prosecute his said writ of error to effect and shall abide the decision of the said Circuit Court of Appeals of the United States, if he shall fail to make good his plea, then this obligation to be void; otherwise to remain in full force and virtue.

John Francis, (Seal.)
John Donohue, (Seal.)
Thos. C. McGrath, (Seal.)
John J. Gilligan, (Seal.)

Sealed and delivered in presence of:
Robt. C. Georgi.

The above security is approved.
A. C. Thompson,
District Judge of the United States, S. D. Ohio.

Southern District of Ohio, ss.:

I, John J. Gilligan, one of the sureties above named, do solemnly swear that, after paying my just debts and liabilities, I am worth ten thousand dollars, in real estate in my own name, situate in the county of Hamilton, in said district.

John J. Gilligan.

Sworn to before me the 10th day of April, 1900.
(Seal.) Robt. C. Georgi,
Dep. Clerk U. S. District Court, S. D. O.

And afterwards, to wit, on the 9th day of April, A. D. 1900, the following error bond was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Error Bond of Anthony Hoff.

District Court of the United States, Southern District of Ohio, Western Division, ss.:

The United States,

vs.

Anthony Hoff.

Know all men by these presents, that we, Anthony Hoff, as principal, and John Donohue and Thomas C. McGrath, as sureties, are held and firmly bound unto The United States of America, in the sum of two thousand dollars, to be paid to the said The United States of America. To which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals, dated this 9th day of April, 1900.

Whereas, the above named Anthony Hoff has taken out a writ of error to the Circuit Court of Appeals of the United States, Sixth Circuit, to reverse the judgment rendered in the above entitled action by the District Court of the United States for the Southern District of Ohio.

Now, therefore, the condition of this obligation is such, that if the above named Anthony Hoff, shall prosecute his said writ of error to effect and shall abide the decision of the said Circuit Court of Appeals of the United States, if he shall fail to make good his plea, then this obligation to be void; otherwise to remain in full force and virtue.

Anthony Hoff, (Seal.)
John Donohue, (Seal.)
Thos. C. McGrath, (Seal.)

Sealed and delivered in presence of:
Robt. C. Georgi.

The above security is approved.
A. C. Thompson,
District Judge of the United States, S. D. Ohio.

And afterwards, to wit, on the 9th day of April, A. D. 1900, the following error bond was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Error Bond of John Edgar, alias Peter Edgar.

District Court of the United States, Southern District of Ohio, Western Division, ss.:

The United States,

vs.

John Edgar, alias Peter Edgar.

Know all men by these presents, That we, John Edgar, alias Peter Edgar, as principal, and John Donohue and Thomas C. McGrath, as sureties, are held and firmly bound unto the United States of America, in the sum of two thousand dollars, to be paid to the said the United States of America. To which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals, dated this 9th day of April, 1900.

Whereas, the above named John Edgar, alias Peter Edgar, has taken out a writ of error to the Circuit Court of Appeals of the United States, Sixth Circuit, to reverse the judgment rendered in the above entitled action by the District Court of the United States for the Southern District of Ohio.

Now, therefore, the condition of this obligation is such, that if the above named John Edgar, alias Peter Edgar, shall prosecute his said writ of error to effect and shall abide the decision of the said Circuit Court of Appeals of the United States, if he shall fail to make good his plea, then this obligation to be void; otherwise to remain in full force and virtue.

John Edgar, (Seal.)
John Donohue, (Seal.)
Thos. C. McGrath, (Seal.)

Sealed and delivered in presence of:
Robt. C. Georgi.

The above security is approved.
A. C. Thompson,
District Judge of the United States, S. D. Ohio.

The United States of America, Southern District of Ohio, Western Division, ss.:

I, Benjamin R. Cowen, clerk of the District Court of the United States of America, within and for the Division and District aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court, in the above entitled cause, as the same appears of record and on file in the clerk's office of said court.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said court, at the city of Cincinnati, Ohio, this 2d day of May, A. D. 1900.

(Seal.) B. R. Cowen, Clerk.

By Janie W. F. Cowen, Deputy Clerk.

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United States Circuit Court of Appeals for the Sixth Circuit.

United States of America, Sixth Judicial Circuit, ss.:

The President of the United States, to the Honorable the Judge of the District Court of the United States for the Southern District of Ohio, Western Division—Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between The United States of America and Charles W. Reilley and others, a manifest error hath happened, to the great damage of the said Charles W. Reilley and others, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati, in said circuit, on the eighth day of May, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 9th day of April, in the year

of our Lord one thousand nine hundred, and of the Independence of the United States of America the one hundred and twenty-fourth.

(Seal.) B. R. Cowen,
Clerk of the District Court of the United States,
Southern Dist. of Ohio.
By Robt. C. Georgi, Deputy.

Allowed by:
Albert C. Thompson,
District Judge.

*Not exceeding 30 days from the day of signing the citation.

No. 377. United States District Court, Southern District of Ohio, Western Division. The United States vs. Chas. W. Reilley, et al. Writ of error. Filed Apr. 9, 1900. B. R. Cowen, Clerk.

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United States Circuit Court of Appeals, for the Sixth Circuit.

United States of America, Sixth Judicial Circuit, ss.:

To the United States of America—Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the city of Cincinnati, in said circuit, on the* eighth day of May, next, pursuant to a writ of error, filed in the clerk's office of the District Court of the United States for the Southern District of Ohio, Western Division, wherein Charles W. Reilley, John Francis, Anthony Hoff and Peter Edgar, plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this ninth day of April, in the year of our Lord one thousand nine hundred, and of the Independence of the United States of America the one hundred and twenty-fourth.

A. C. Thompson,
Judge U. S. District Court, S. D. O.

*Not exceeding 30 days from the day of signing.

April 9th, 1900.

On behalf of the United States of America, I hereby waive formal service of the citation upon me and enter the appearance of the said defendant in error herein the same as if regularly served by legal process.

William E. Bundy,
United States Attorney, S. D. O.

No. 377. United States District Court, Southern District of Ohio, Western Division. The United States vs. Chas. W. Reilley, et al. Citation. Filed Apr. 9, 1900. B. R. Cowen, Clerk.

And afterwards, to wit, on August 4th, 1900, a stipulation was filed extending time for filing briefs, which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

CHARLES W. REILLEY ET AL., Plaintiffs in Error,
*vs.*
THE UNITED STATES OF AMERICA, Defendants in Error.
} No. 849. Entry.

At the request of plaintiffs in error, it is hereby stipulated and agreed that their time for printing and filing brief may be extended until October first.

WM. E. BUNDY,
*U. S. Attorney.*
M.
SHAY & COGAN,
*Att'ys for Pl'ffs in Error.*

And afterwards, to wit, on November 13th, 1900, a stipulation was filed clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

CHARLES W. REILLEY, JOHN FRANCIS, Anthony Hoff, and John Edgar, alias Peter Edgar, Plaintiffs in Error,
*vs.*
THE UNITED STATES OF AMERICA, Defendants in Error.
} Stipulation for Continuance.

Counsel of record hereby stipulate and agree that the hearing in this case may be postponed until January, 1901.

SHAY & COGAN,
*Attorneys for Plaintiffs in Error.*
WM. E. BUNDY,
*United States Attorney S. D. O., for Defendants in Error.*

And afterwards, to wit, on January 16, 1901, an order was entered in said cause, which is in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

CHARLES W. REILLEY ET AL.
*vs.*
THE UNITED STATES OF AMERICA.

Error to the district court of the United States for the southern district of Ohio.

Before Judges Lurton, Day, & Severens.

This cause is argued on behalf of plaintiffs in error by Mr. Thomas F. Shay and continued until tomorrow, at 9.30 a. m., for further argument.

And afterwards, to wit, on January 17th, 1901, an order was entered in said cause, which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

CHARLES W. REILLEY ET AL.
*vs.*
THE UNITED STATES OF AMERICA.

This cause is further argued on behalf of defendants by Mr. Sherman T. McPherson and is submitted to the court.

And afterwards, to wit, on February 12th, 1901, a judgment was rendered in said cause, which is in the words and figures as follows:

*Judgment.*

United States Circuit Court of Appeals for the Sixth Circuit.

CHARLES W. REILLEY ET AL.
*vs.*
THE UNITED STATES OF AMERICA. } No. 849.

Error to the district court of the United States for the southern district of Ohio.

This cause came on to be heard on the transcript of the record from the district court of the United States for the southern district of Ohio and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be, and the same is hereby, affirmed.

Feb'y 12, 1901.

And afterwards, to wit, on February 22nd, 1901, an opinion was filed in said cause clothed in the words and figures as follows:

United States Circuit Court of Appeals, Sixth Circuit.

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|---|---|
| CHARLES W. REILLEY, JOHN FRANCIS, Anthony Hoff, and John Edgar, alias Peter Edgar, Plaintiffs in Error, *v.* THE UNITED STATES OF AMERICA, Defendants in Error. | No. 849. Error to the District Court of the United States for the Southern District of Ohio. |

Submitted Jan. 17, 1901; decided Feb. 12, 1901.

Before Lurton, Day, and Severens, circuit judges.

SEVERENS, *Circuit Judge:*

The above-named plaintiffs in error were convicted in the court below of the offense of having conspired to commit an offense against the United States. The statute which creates the offense of conspiracy and makes it punishable is section 5440 of the Revised Statutes, as amended by the act of May 17, 1879, which is as follows:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment of not more than two years, or to both fine and imprisonment in the discretion of the court."

The offense which the plaintiffs in error are charged with having conspired to commit is defined by the first section of the act passed March 2, 1895, entitled "An act for the suppression of lottery traffic through national and interstate commerce and postal service, subject to the jurisdiction and laws of the United States." This section reads as follows:

"That any person who shall cause to be
brought within the United States from abroad, for the purpose of disposing of the same,
or deposited in or carried by the mails of the United States,
or carried from one State to another in the United States, any paper, certificate, or instrument purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, to be brought into the United States, or deposited in or carried from one State to another in the same shall be punishable in the first offense by imprisonment for not more than two years or by a fine of not more than one thousand dollars, or both, and in the second and after offenses by such imprisonment only."

We have divided the clauses of this section in such manner as to indicate what we conceive to be the true construction thereof, as will be hereafter explained.

The indictment charges the respondents with having conspired within the district "to cause to be carried from one State to another in the United States, to wit: from the city of Newport, in the State of Kentucky, to the city of Cincinnati, in the State of Ohio, papers, certificates and instruments purporting to be and to represent, as they then and there well knew, tickets, chances, shares and interests in and dependent upon the event of a lottery and similar enterprise offering prizes dependent upon lot and chance, that is to say, to cause to be carried as aforesaid papers, certificates and instruments purporting to be and to represent the chances, shares and interests in the prizes, which, by lot and chance, might be awarded to persons (to these grand jurors unknown) who might select certain numbers which by lot and chance should be included in twelve numbers drawn and selected as hereinafter stated, at certain drawings in lottery, which was an enterprise offering prizes dependent upon lot and chance and commonly known as "policy," and consisted, as they then and there well knew, in the drawing and selection by lot and chance, at stated intervals, of twelve of the numbers from one to seventy-eight, inclusive, and of awarding prizes in various amounts (to these grand jurors unknown) to those who prior to the time of any one of said drawings and selections, upon the payment of a small sum of money, may have selected various combinations of numbers included in the said twelve numbers thereafter drawn and selected by lot and chance as aforesaid."

And it is further charged that in pursuance of the conspiracy and to effect the object thereof, being for the purpose of causing to be carried from one State into another in the United States, to wit: from the State of Kentucky to the State of Ohio, as aforesaid, papers, certificates and instruments purporting to be and to represent tickets, chances, shares and interests in and dependent upon the event of a lottery and similar enterprise offering prizes dependent upon lot and chance, as aforesaid, as they then and there well knew, said Anthony Hoff, John Edgar, alias Peter Edgar, Charles W. Reilley and John Francis, did then and there, on said date aforesaid, in the county, State, circuit, division and district aforesaid, unlawfully, knowingly and feloniously cause to be carried from one State to another in the United States, to wit: from Newport, in the State of Kentucky, to Cincinnati, in the State of Ohio, five certain papers, certificates and instruments purporting to be and to represent chances, shares and interests in the prizes to be awarded by lot and chance in the drawings to be made thereafter in said certain lottery, commonly known as the game of "policy," which said papers, certificates and instruments were in the words and figures, following, to wit:

(Here follows certain blocks of figures and letters.) And thereupon the indictment proceeds:

"Said papers, certificates and instruments, and the letters and figures thereon, purported and represented to be and were tickets,

chances, shares and interests in and dependent upon the event of a lottery and similar enterprise offering prizes dependent upon lot and chance, and were and did represent various combinations of numbers selected by one H. T. Harrison, and other players and persons to the grand jurors unknown, as and being their interest and chance in a proposed drawing of said lottery, in accordance with the general scheme and plan hereinbefore described; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

Upon the trial the Government offered evidence tending to prove that the respondents adopted a scheme of lottery business called by them "policy," which they subsequently carried into operation, of the character following. The principal office for the transaction of the business was located in a building in Cincinnati, Ohio. The place where the drawings of numbers from a wheel were made was located in another building or room adjoining the principal office and connected with it by a private way. In various places in that city and elsewhere, in Ohio and other States, one, at least, being in Newport, Kentucky, they had offices or stations at which the patrons purchased tickets or chances in the drawings to be thereafter made in Cincinnati, at the place mentioned. Successive numbers from one to seventy-eight, inclusive, were each day put into the wheel, and at each drawing twelve numbers were taken out. A list of these twelve numbers was taken into the principal office and there recorded. Several hours in the day before these drawings respectively took place, the patrons purchased chances at the sub-offices or stations from an agent of the respondents, or from one of the latter, in charge at that place. In this instance the purchase was made of the respondent Hoff at the Newport office. The purchaser (Harrison, in this instance) chose three of the numbers from one to seventy-eight, inclusive, and wrote them upon a slip of paper, of which, according to the method of doing business, he kept a duplicate. He handed his list of numbers, with figures to denote the sum paid, upon a slip of paper, and the money to pay for his chance, to the person in charge to be transmitted to the principal office in Cincinnati, by the "carrier" who would call to take them up. When these slips and the moneys were all brought into the principal office, the drawing above mentioned took place. If the three numbers on the slip were of the twelve drawn from the wheel, the purchaser would win the prize, $200, when the game (of which there were several forms) was played on the basis above stated. If not, he lost. A report of the drawings was sent back to the station from which the slip came, and if any purchaser had made a "hit" his slip would be returned with the prize to be there delivered to him. Of the respondents, Reilley was in charge of the principal office, Francis of the drawings, Hoff of the station in Newport, as already stated, and Edgar was the carrier. The slip of paper taken by the carrier represented the interest of the purchaser of the chance and, although containing figures only, it had a definite meaning and was understood by all the parties concerned. It was the transportation of some of such lists, one being that of Harrison, from Newport, Kentucky, to Cincinnati, Ohio,

with knowledge of their character that constituted the overt act done in pursuance of the conspiracy.

The first question to be resolved arises upon the contention made by counsel for plaintiffs in error, that upon the due construction of the first section of the act of March 2, 1895, the successive clauses enumerating the several cases in which the offense may be committed, all depend upon a condition which is supposed to exist in consequence of the words first occurring, that the paper, certificate, etc., has been brought into the United States from abroad for the purpose of disposing of the same. It is argued that this must be so for the reason, and this is the principal ground of the argument, that by the second section of the act there is an express provision that no former statute against the establishment of lotteries, traffic in lottery tickets, the circulation thereof or of advertisements relating thereto, should be deemed to be repealed by implication. Without going through with a reference to, and an analysis of, all such former statutes, it is sufficient to say that none such has been brought to our attention, which is inconsistent with the statute in question unless it be the act of September, 1890, which relates to the carriage of matter concerning lotteries in the mails, and which imposes a different penalty in such cases from that imposed by the act in question. From the fact of such discrepancy, it is contended that Congress must have intended that the language of the later act should be construed to refer only to things brought in from abroad to be disposed of in this country against which there had been no previous legislation imposing any other penalty than a forfeiture. There is some force in this argument, but we do not think it sufficient to overcome the clear indications to the contrary. In the first place it would render the composition of the first section of the act of 1895 ungrammatical. In the next place the title to the act indicates an intention to exert the power of Congress in all directions authorized by the clauses of the Constitution relating to the regulation of commerce and the establishment of a mail service. Besides, the distribution of subjects by the language used in the latter part of the section reflects upon the former part a similar meaning. And the whole section is in apt language to cover the ground indicated by the title of the act. And we see no necessity for extending the condition that the matter is brought in "for the purpose of disposing of the same" to other cases than that of bringing it into the United States from abroad. We have no doubt that the purpose of Congress was to lay its hand upon the business at each and every one of the enumerated steps taken for the purpose of carrying it on, and that one of the steps it had in contemplation was the carrying of the instruments employed in the business from one State to another, and that as to this offense no qualification that the act should be done with the purpose of disposing of the thing carried was intended. We may at this point observe that inasmuch as the section of the act under consideration constitutes three distinct offenses, we do not conceive it to be necessary to determine to what extent the act is inconsistent, in respect to the forbidden use of the mails, with former statutes, or if there be such inconsistency, what

the effect thereof may be, for the case before us does not involve that offense.

But the question upon which we have the gravest concern, and which is of much importance, arises upon the objection that the act of March 2, 1895, in so far as it relates to the mere carrying of the obnoxious matter from one State into another, though done with knowledge of its character, transcends the constitutional power of Congress. The statute was enacted in the exercise of the power to regulate commerce with other countries and between the States, and the power to establish post-offices and post-roads. That part of the statute on which the present indictment is founded depends upon the authority which may be exercised under the grant of Congress of the first of these powers, and the question is whether the business in which these parties were engaged is "commerce" within the meaning of that term in the Constitution. The question opens a field upon which some lines have been clearly marked, but with respect to the particular inquiry with which we have to deal, we have no distinct guide. Commerce is said by Chief Justice Marshall in the leading case of Gibbons *v.* Ogden, 9 Wheat., to undoubtedly mean "traffic," but to mean more than that and to signify "intercourse." But both of these latter are general words and do not precisely define what kind of intercommunication is meant; and we have to follow the course of subsequent adjudication in further elucidation of the scope and meaning of the word. Without going into other lines of inquiry than those which are most nearly relevant to the present subject, we come to the case of Paul *v.* Virginia, 8 Wal., 168, where the question was whether an agent of a New York insurance company, who was engaged in effecting insurance for his company in Virginia with residents of the latter State, was subject to certain regulations of that State of the conditions and manner under and in which such business should be done. And it was held, first, that it was competent for the State to prescribe the conditions upon which the foreign corporation should be admitted to do business in the State, and, second, that the business of insurance, conducted as that was, was not interstate commerce. It is to be observed, however, that as pointed out by Mr. Justice Field, the business there in question did not involve intercourse between one party in one State and another party in another State, for the transactions took place wholly in Virginia, and the communications between New York and Virginia were wholly between the constituents of one party, that is to say, the insurance company and its agent, and the dealing was not between those persons. Said Mr. Justice Field, "The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce." That case would seem to have sometimes received a wider interpretation than the decision upon the facts would justify, and to have been supposed to justify the

proposition that a contract of insurance effected through interstate communication is not interstate commerce, but no authoritative decision affirming that proposition has been cited, or has been found by us. In the Trade-mark cases, 100 U. S., 82, Mr. Justice Miller in the course of reasoning from analogies, at page 95, said that "in Paul *v.* Virginia, 8 Wal., 168, this court held that a policy of insurance made by a corporation of one State on property situated in another was not an article of commerce, and did not come within the clause we are considering." "They are not," says the court, "commodities to be shipped or forwarded from one State to another, and then put up for sale." "On the other hand," pursues the learned justice, "in Almy *v.* State of California, 24 How., 169, it was held that a stamp duty imposed by the legislature of California on bills of lading for gold and silver transported from any place in that State to another out of the State, was forbidden by the Constitution of the United States, because such instruments being a necessity to the transaction of commerce, the duty was a tax upon exports."

With great deference to the learned justice we cannot think that his statement of what was held in Paul *v.* Virginia was correct; and, moreover, the ground on which he says that that decision was placed, namely, that policies of insurance are not commodities to be shipped from one State into another, and there put up for sale, could not be supported as sufficient in view of what has been decided in other cases presently to be referred to, and would, as it seems to us, be much narrower than the bounds of the definition given in Gibbons *v.* Ogden.

The case of Paul *v.* Virginia was again cited in Philadelphia Fire Association *v.* New York, 119 U. S., 110, but only, in that case, in support of the proposition that a State has power to prescribe the conditions on which a foreign corporation may be admitted to do business in the State. The question there was whether a foreign corporation which had entered the State and carried on business therein could question the validity of a law of the State prescribing such conditions. Paul *v.* Virginia was again referred to in Hooper *v.* California, 155 U. S., 648, at page 653, which was a case involving the validity of a statute of California, making it a misdemeanor for a person in that State to procure insurance for a resident thereof from a foreign corporation which had not filed the bond required by another statute of that State. The court held that the law was a valid exercise of the right of the State to prescribe conditions upon which the foreign corporation should be allowed to do business therein, unless such business of the foreign company was one of a "Federal nature," one class of which is interstate commerce. To the contention that marine insurance (which was the business that the respondent was charged with having conducted without filing the bond required) was interstate commerce and so beyond the reach of State authority, it was replied that "this proposition involves an erroneous conception of what constitutes interstate commerce. That the business of insurance does not generically appertain to such commerce has been settled since the case of Paul *v.* Virginia, 8 Wal.,

168. See also Phila. Fire Insurance Co. *v.* New York, 119 U. S., 110, and authorities there cited."

It is not within our province to question the law as declared by the court in that case, nor have we any disposition to do so, but for the purpose of comparing the classes of cases which we deem most relevant to our present duty, we are, no doubt, permitted to say that what we understand the language of the opinion, last cited, to mean, is that the effecting insurance is not necessarily interstate business, and would not be so where the contract was made in the State and the participants in the transaction were in the State. The case does not decide that if by the method of doing the business the party desiring insurance in one State should transmit his application therefor to an insurer in another State and the insurer should thereupon transmit to the insured his acceptance of the application, this would not constitute interstate commerce. But if this were so established, we do not think the doctrine would be applicable here for reasons hereinafter stated. This class of cases is principally relied upon by counsel for plaintiffs in error as declaring the rule that in order to constitute commerce there must be traffic in commodities, and that interstate commerce involves also the transportation of such commodities from one State to another, and that mere business intercourse between parties residing in different States unaccompanied by the transportation of commodities such as are bought and sold by traffic is not within the scope of commerce between the States within the meaning of the Constitution. But we do not think that upon a comparison with other decisions of the Supreme Court so broad a doctrine was intended to be affirmed in the cases to which we have referred.

Passing to other classes of cases arising upon the exercise of the power in question, it has been frequently held, as was said by Mr. Justice Bradley in Crutcher *v.* Kentucky, 141 U. S., 47, that the power of Congress over interstate commerce is coextensive with its power over foreign commerce. Indeed, both are included in an identical grant. Can it be possible to hold that Congress has not the power to prohibit the importation from abroad into the United States of instrumentalities for carrying on a business fraught with evil to its inhabitants? Or, to put a precisely relevant question, can it be doubted that Congress has the authority to legislate against the importation of lottery tickets into the United States from foreign countries, as it has attempted to do by this act? It would seem that the denial of such power would be an unfortunate and uncalled-for restriction of the grant of authority intended by the Constitution. Until recently Congress had not seen fit to exercise its power in this direction, and for this reason the instance seems novel, but in the circumstances, this is no argument against its existence.

In respect to the inquiry as to what constitutes interstate commerce and particularly to the question whether it is limited to the case of traffic in and the transportation of commodities for the purposes of such traffic, reference may be profitably had to some other cases decided by the Supreme Court. We have already indicated our view that in Gibbons *v.* Ogden the subjects which

were included in the power granted Congress was not thought to be so restricted. In the case of Gloucester Ferry Co. *v.* Pennsylvania, it was held that the transportation of passengers as well as freight from one State to another by a ferry was interstate commerce. In the case of Covington, &c., Bridge Co. *v.* Kentucky, it was held that the company's bridge across the Ohio was an instrumentality of interstate commerce, because it furnished the means of intercourse between the people of two States, and the taking of toll for the passage of persons, as well as of freight, was interstate business. In that case it was remarked by Mr. Justice Brown in delivering the opinion of the court, referring to the Gloucester Ferry case, "If, as was intimated in that case, interstate commerce means simply commerce between the States, it must apply to all commerce which crosses the State line regardless of the distance from which it comes or to which it is bound; in other words, if it be commerce to send goods from Cincinnati, in Ohio, to Lexington, in Kentucky, it is equally such to send goods or travel in person from Cincinnati to Covington." And again, "commerce was defined in Gibbons *v.* Ogden, 9 Wheat.—1–189, to be 'intercourse,' and the thousands of people who daily pass and repass over the bridge may as truly be said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool." In that case the "bridge" was a mere instrumentality. It was the use of it for the purpose of intercourse between the people of the two States which impressed upon the structure the character of an instrumentality or agency of such intercourse. Indeed, it is impossible to conceive that an instrument by which business is transacted can have any commercial character otherwise than as it reflected upon it by the business itself. Whether it be a ferry, a bridge, a railroad or a telegraph line, the agency has no intrinsic quality which brings it within the purview of the commerce clause of the Constitution. It acquires that quality from its appropriation to the uses of interstate commerce. In Telegraph Co. *v.* Texas, 105 U. S., 460, it was decided that intercourse by the telegraph between the States is interstate commerce, and that a tax on messages is a tax on the commerce itself. And this doctrine has been reaffirmed in several subsequent cases. So it was held in the Passenger Cases, 7 How., 283, and Henderson *v.* The Mayor, 92 U. S., 259, that the importation of passengers into the United States was commerce with foreign nations, and so within the control of Congress. And so it is not doubted that Congress may legislate for the exclusion of passengers who from diseased or other conditions would be an offense to the welfare of the public. And in Crandall *v.* Nevada, 6 Wal., 35, the doctrine of the cases last cited was applied to the transportation of passengers by a railroad from one State into another. These cases seem to us altogether inconsistent with the idea that interstate commerce is limited to traffic in commodities or merchandise. In the telegraph cases, for instance, it is nowhere suggested that the messages which would be exempt from State taxation should be such only as relate to traffic. In the pas-

senger cases there is no element of barter of commodities or merchandise of any sort.

In the present case it would seem that the enterprise in which these parties are alleged to have been engaged, was one which involved business intercourse between parties in different States, and that by means of the transportation of the instruments with which it was carried on from one State into another. And it is not material that transportation was done by a private individual rather than by a corporation. The slips which represented the interest of the buyer of the chance, its contents being understood by all the parties to the transaction, was a ticket in the lottery. That the game was a lottery has several times been decided in the State courts. People *v.* Elliot, 74 Mich., 264; Commonwealth *v.* Sullivan, 146 Mass., 142; Wilkinson *v.* Gill, 74 N. Y., 63; State *v.* Kansas Mercantile Association, 45 Kans., 351.

The inclination of our judgment is to hold that the statute in question is not invalid, and that the present case is covered by it. But conceding that there may be some doubt of the correctness of our conclusion that the statute is within the power of Congress, the doubt we have is not sufficient to justify us in holding it to be invalid, seeing that in this class of cases our judgment is made by law subject to the supervision of the Supreme Court.

It is further objected that the indictment is defective in not showing that a lottery was being conducted. No objection was made on this account either before or at the trial. We think it appears with reasonable certainty that such a transaction was being carried on, although the averments are not, perhaps, so direct and specific as would have been necessary to encounter a prompt objection on that account.

The indictment is much more full and specific than that in Com. *v.* Sullivan, *supra*, which the court said was "well enough."

It is also urged that the evidence did not justify the verdict in that there was no proof of conspiracy to do what was done. As has been often remarked it is not necessary that direct evidence of a formal agreement should be given in such cases. If the evidence of the separate details of the transaction as it was carried out indicates with the requisite certainty the existence of a preconcerted plan and purpose, that is sufficient. And we think the evidence was such as to warrant the verdict.

Many objections were made upon the trial to the rulings of the court in admitting evidence. More than one hundred and fifty errors are assigned, a large proportion of which relate to these rulings. Many of the objections related to similar matters, and there was needless and tiresome repetition.

We have, however, gone through the bill of exceptions and have found no instance in which any ground or reason whatever was assigned on which the objections were made. The reason for the rule requiring counsel to state the grounds of their objections is augmented where the frequency of objections may lead the court to the conclusion that the counsel is content to take his chances in finding the reasons afterward. The rule itself is settled by a great number

of decided cases, many of which are collected in 8 Encyl. of Pl. & Pract., at page 163; and see especially as indicating the practice in the courts of the United States, Camden *v.* Doremus, 3 How., 315; Tabor *v.* Commercial National Bank of Cleveland, 62 Fed., 383.

General exceptions were taken to the charge of the court to the jury. Some of them have been disposed of by what we have said in dealing with the topics already discussed. We have examined the instructions of the court, as well as the requests of counsel for the respondents to charge the jury, and think the case was fairly submitted to the jury, and that all proper instructions were given them. In view of the multitudinous exceptions and assignments of error under this head, we must content ourselves with refraining from a separate discussion of each.

The judgment will be affirmed.

And afterwards, on March 2, 1901, the following petition in error was filed:

United States Circuit Court of Appeals, Sixth Circuit.

| | |
|---|---|
| JOHN FRANCIS, ANTHONY HOFF, and JOHN Edgar, alias Peter Edgar, Plaintiffs in Error, *vs.* THE UNITED STATES OF AMERICA, Defendants in Error. | No. 849. Petition in Error. |

Now come John Francis, Anthony Hoff, and John Edgar, alias Peter Edgar, and represent to the court that there is error in the record and proceedings herein in this, to wit:

First. That this court erred in affirming the judgment of the United States district court and rendering judgment against the plaintiffs in error herein, because it is manifest from the record herein that the said United States circuit court of appeals erred in affirming the action of the district court in overruling the motion to quash the indictment, as filed by Charles W. Reilley, for the reasons therein stated, and excepted to by said defendant:

Second. In affirming the action of the district court in overruling the motion to quash the indictment, as filed by John Francis, for the reasons stated therein, and excepted to by said defendant.

Third. In affirming the action of the district court in overruling the motion to quash the indictment, as filed by Anthony Hoff, for the reasons therein stated, and excepted to by said defendant.

Fourth. In affirming the action of the district court in overruling the motion to quash the indictment, as filed by John Edgar, alias Peter Edgar, for the reasons therein stated, and excepted to at the time by said defendant.

Fifth. In affirming the action of the district court in overruling the demurrer filed herein by Charles W. Reilley, for the reasons therein stated, and to which action of the court the defendant at the time excepted.

Sixth. In affirming the action of the district court in overruling the demurrer filed herein by John Francis, for the reasons therein stated, and to which action of the court the defendant at the time excepted.

Seventh. In affirming the action of the district court in overruling the demurrer filed herein by Anthony Hoff, for the reasons therein stated, and to which action of the court the defendant at the time excepted.

Eighth. In affirming the action of the district court in overruling the demurrer filed herein by John Edgar, alias Peter Edgar, for the reasons therein stated, and to which action of the court the defendant at the time excepted.

Ninth. In affirming the action of the district court in overruling the motion for a new trial filed herein by Charles W. Reilley, for the reasons therein stated.

Tenth. In affirming the action of the district court in overruling the motion for a new trial filed herein by John Francis, for the reasons therein stated.

Eleventh. In affirming the action of the district court in overruling the motion for a new trial filed herein by Anthony Hoff, for the reasons therein stated.

Twelfth. In affirming the action of the district court in overruling the motion for a new trial filed herein by John Edgar, alias Peter Edgar, for the reasons therein stated.

Thirteenth. In affirming the action of the district court in overruling the motion in arrest of judgment filed herein by Charles W. Reilley, for the reasons stated therein.

Fourteenth. In affirming the action of the district court in overruling the motion in arrest of judgment filed herein by John Francis, for the reasons stated therein.

Fifteenth. In affirming the action of the district court in overruling the motion in arrest of judgment filed herein by Anthony Hoff, for the reasons stated therein.

Sixteenth. In affirming the action of the district court in overruling the motion in arrest of judgment filed herein by John Edgar, alias Peter Edgar, for the reasons stated therein.

Seventeenth. In affirming the action of the district court in overruling the motion at the close of the testimony offered by the United States, as filed by Charles W. Reilley, requesting the court to direct the jury to acquit, for the reasons therein stated.

Eighteenth. In affirming the action of the district court in overruling the motion at the close of the testimony offered by the United States, as filed by John Francis, requesting the court to direct the jury to acquit, for the reasons therein stated.

Nineteenth. In affirming the action of the district court in overruling the motion at the close of the testimony offered by the United States, as filed by Anthony Hoff, requesting the court to direct the jury to acquit, for the reasons therein stated.

Twentieth. In affirming the action of the district court in overruling the motion at the close of the testimony offered by the United

States, as filed by John Edgar, alias Peter Edgar, requesting the court to direct the jury to acquit, for the reasons therein stated.

To all of which the defendants at the time excepted.

And because the said district court erred in overruling the motion of these defendants to set aside the verdict and for a new trial herein, and erred in overruling the motion in arrest of judgment, all of which will more fully and particularly appear in the assignments of error filed herein and to which these petitioners refer for a more detailed statement, and these petitioners say that said errors cannot be corrected except by a writ of error to issue out of this court, returnable to the Supreme Court of the United States, and which writ of error these petitioners respectfully pray may be allowed, and upon the return thereof the said errors may be corrected and the judgment rendered herein may be set aside and held for naught and a new trial herein may be granted; and these petitioners will ever pray.

THOMAS F. SHAY,
*Attorney for Plaintiffs in Error.*

And afterwards, on the same day, to wit, March 2, 1901, the following assignment of errors was filed:

United States Circuit Court of Appeals, Sixth Circuit.

JOHN FRANCIS, ANTHONY HOFF, and JOHN EDGAR, alias PETER EDGAR, Plaintiffs in Error,
*vs.*
THE UNITED STATES OF AMERICA, Defendants in Error.
} No. 849. Criminal.

*Assignments of Error.*

Now come John Francis, Anthony Hoff, and John Edgar, alias Peter Edgar, and represent to the court that there is error in the record and proceedings herein, in this, to wit:

First. That this court erred in affirming the judgment of the United States district court and rendering judgment against the plaintiffs in error herein, because it is manifest from the record herein that the said United States circuit court of appeals erred in affirming the action of the district court in overruling the motion to quash the indictment as filed by Charles W. Reilley for the reasons therein stated and excepted to by said defendant.

Second. In affirming the action of the district court in overruling the motion to quash the indictment as filed by John Francis for the reasons stated therein and excepted to by said defendant.

Third. In affirming the action of the district court in overruling the motion to quash the indictment as filed by Anthony Hoff for the reasons therein stated and excepted to by said defendant.

Fourth. In affirming the action of the district court in overruling the motion to quash the indictment as filed by John Edgar, alias

Peter Edgar, for the reasons therein stated and excepted to at the time by said defendant.

Fifth. In affirming the action of the district court in overruling the demurrer filed herein by Charles W. Reilley for the reasons therein stated, and to which action of the court the defendant at the time excepted.

Sixth. In affirming the action of the district court in overruling the demurrer filed herein by John Francis for the reasons therein stated, and to which action of the court the defendant at the time excepted.

Seventh. In affirming the action of the district court in overruling the demurrer filed herein by Anthony Hoff for the reasons therein stated, and to which action of the court the defendant at the time excepted.

Eighth. In affirming the action of the district court in overruling the demurrer filed herein by John Edgar, alias Peter Edgar, for the reasons therein stated, and to which action of the court the defendant at the time excepted.

Ninth. In affirming the action of the district court in overruling the motion for a new trial filed herein by Charles W. Reilley for the reasons therein stated.

Tenth. In affirming the action of the district court in overruling the motion for a new trial filed herein by John Francis for the reasons therein stated.

Eleventh. In affirming the action of the district court in overruling the motion for a new trial filed herein by Anthony Hoff for the reasons therein stated.

Twelfth. In affirming the action of the district court in overruling the motion for a new trial filed herein by John Edgar, alias Peter Edgar, for the reasons therein stated.

Thirteenth. In affirming the action of the district court in overruling the motion in arrest of judgment filed herein by Charles W. Reilley for the reasons stated therein.

Fourteenth. In affirming the action of the district court in overruling the motion in arrest of judgment filed herein by John Francis for the reasons stated therein.

Fifteenth. In affirming the action of the district court in overruling the motion in arrest of judgment filed herein by Anthony Hoff for the reasons stated therein.

Sixteenth. In affirming the action of the district court in overruling the motion in arrest of judgment filed herein by John Edgar, alias Peter Edgar, for the reasons stated therein.

Seventeenth. In affirming the action of the district court in overruling the motion at the close of the testimony offered by the United States as filed by Charles W. Reilley, requesting the court to direct the jury to acquit, for the reasons therein stated.

Eighteenth. In affirming the action of the district court in overruling the motion at the close of the testimony offered by the United States as filed by John Francis, requesting the court to direct the jury to acquit, for the reasons therein stated.

Nineteenth. In affirming the action of the district court in overruling

the motion at the close of the testimony offered by the United States as filed by Anthony Hoff, requesting the court to direct the jury to acquit, for the reasons therein stated.

Twentieth. In affirming the action of the district court in overruling the motion at the close of the testimony offered by the United States as filed by John Edgar, alias Peter Edgar, requesting the court to direct the jury to acquit, for the reasons therein stated.

To all of which the defendants at the time excepted.

And because the said district court erred in overruling the motion of these defendants to set aside the verdict and for a new trial herein and erred in overruling the motion in arrest of judgment; all of which will more fully and particularly appear in the assignments of error filed herein, and to which these plaintiffs in error refer for a more detailed statement.

THOMAS F. SHAY,
*Att'y for Pl'ff in Error.*

United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, clerk of the United States circuit court of appeals for the sixth circuit, do hereby certify that the foregoing is a true and correct copy of the record in the case of Charles W. Reilley *et al. vs.* United States of America, No. 849, as the same remains upon the files and records of said United States circuit court of appeals for the sixth circuit and of the whole thereof.

Seal United States Circuit Court of Appeals, Sixth Circuit.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at the city of Cincinnati, Ohio, this 2d day of March, A. D. 1901.

FRANK O. LOVELAND,
*Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.*

Endorsed on cover: File No., —. U. S. circuit court of appeals, 6th circuit. Term No., —. John Francis, Anthony Hoff, and John Edgar, alias Peter Edgar, petitioners, *vs.* The United States. Petition for writ of certiorari and exhibit thereto. Filed —— —, 190–.

UNITED STATES OF AMERICA, *ss*:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the sixth circuit, Greeting:

Being informed that there is now pending before you a suit in which Charles W. Reilley, John Francis, Anthony Hoff, and John Edgar alias Peter Edgar, are plaintiffs in error and The United States, is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the district court of the United States for the southern district of Ohio, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the first day of May, in the year of our Lord one thousand nine hundred and one.

JAMES H. McKENNEY,
*Clerk of the Supreme Court of the United States.*

UNITED STATES OF AMERICA, *Sixth Judicial Circuit,* } *ss*:

I return the foregoing writ pursuant to stipulation of counsel filed in my office May 4th, 1901, which is in the following words:

"JOHN FRANCIS ET AL.
*vs.*
THE UNITED STATES.

It is stipulated by and between counsel for the petitioners and the United States district attorney, counsel for the United States, respondent herein, that the certified transcript of record in this cause, now on file in the office of the clerk of the Supreme Court of the United States, may be taken as a return to the writ of certiorari granted herein.

MILLER OUTCALT &
THOMAS F. SHAY,
*Attorneys for Petitioners.*
WILLIAM E. BUNDY,
*United States Attorney, S. D. O.*"

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
*Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.*

[Endorsed:] File No. 18,111. Supreme Court of the United States. No. 293. October term, 1901. John Francis *et al. vs.* The United States. Writ of certiorari and return. Filed May 8, 1901.

Endorsed on cover: File No. 18,111. U. S. circuit court of appeals, 6th circuit. Term No. 293. John Francis, Anthony Hoff, and John Edgar, alias Peter Edgar, petitioners, *vs.* The United States. Filed April 8, 1901.

# In the Supreme Court of the United States.

OCTOBER TERM, 1899.

CHARLES F. CHAMPION, APPELLANT,
*v.*
JOHN C. AMES, UNITED STATES MARSHAL. } No. 360.

## MOTION TO ADVANCE.

This proceeding grew out of an indictment against the appellant found in the district court of the United States for the northern district of Texas, on April 13, 1899, charging said Champion and another person with transporting and causing to be transported and depositing for the purpose of being transported, certain lottery tickets, advertisements, etc., from Dallas, Tex., to Fresno, Cal., and other places, in violation of section 5440 of the Revised Statutes of the United States and of the act of March 2, 1895 (chap. 191), 28 Stats., 963. He was apprehended in Chicago, Ill., and brought *habeas corpus* proceedings to prevent his removal to Texas for trial. After hearing by the circuit court of the United States for the northern district of Illinois, the writ was discharged, and Champion remanded to the custody of the

marshal. From such order and judgment he takes this appeal.

He was released on bail in the sum of $1,000 on June 22, 1899.

The case involves the constitutionality of the "interstate lottery act" of March 2, 1895, above referred to.

A number of cases against various persons for violations of the "interstate lottery act" are pending in different districts throughout the United States, and are held pending the decision of the court herein.

In accordance with rule 26, section 3, the Solicitor-General respectfully moves the court to advance the case on the docket and set it down for hearing on a day convenient to the court during the present term.

Opposing counsel concur in this motion.

JOHN K. RICHARDS,
*Solicitor-General.*

JANUARY 5, 1900.

No. 106. Q. 2

Motion to reassign.

Supreme Court U. S.
FILED
NOV 12 1900
JAMES H. McKENNEY,
Clerk.

Filed Nov. 12, 1900.

# In the Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 106.

CHARLES F. CHAMPION,
Appellant,

vs.

JOHN C. AMES,
U. S. Marshal.

**Motion to re-assign case for January 14, 1901.**

This case involves the constitutionality of the Act of Congress of March 2, 1895, "For the suppression of lottery traffic through national and interstate commerce and the postal service," etc. (28 Stat. 963), as applied to the facts appearing in the record herein, namely, the transportation other than by mail of advertisements and tickets. This court in *France* v. *United States*, 164 U. S., 676, 683, held that it was not necessary to decide the question as to the constitutional power of Congress to pass the act. The present case presents this question squarely, and is now assigned for hearing on December 3, 1900.

The undersigned counsel for the appellant was detained by illness from his office for five months from April 13 to October, 1900, and now finds that by reason of professional engagements it will be impracticable for him to make adequate preparation to properly

present this case for argument on the day for which it is set down. Application is therefore made, with the courteous concurrence of the Government, to have the case re-assigned for hearing on January 14, 1901.

Washington, November 12, 1900.

WILLIAM D. GUTHRIE,
Of counsel for appellant.

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Please take notice that the foregoing motion will be presented to the Supreme Court of the United States at the Capitol in the City of Washington, on the 12th day of November, 1900, at the opening of court on that day, or as soon thereafter as counsel can be heard, and that application will then and there be made for the relief asked in said motion.

Dated November 9, 1900.

WILLIAM D. GUTHRIE,
Of counsel for appellant.

TO THE ATTORNEY-GENERAL OF THE UNITED STATES.

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Due and timely service of the foregoing motion and notice thereof is hereby admitted.

Washington, November 9, 1900.

Attorney-General.

1440

No. 106 & 92

Office Supreme Court U.S.
FILED
JAN 8 1901
JAMES H. McKENNEY,
Clerk

Brief of Moritz Rosenthal & David for Appellant

Filed Jan. 8, 1901.

IN THE

# Supreme Court of the United States

CHARLES F. CHAMPION,
*Appellant.*

vs.

JOHN C. AMES, United States Marshal,
*Appellee.*

Number 106

Appeal from the Circuit Court of the United States
For the Northern District of Illinois.

## BRIEF OF APPELLANT.

MORITZ ROSENTHAL,
JOS. B. DAVID,
*Attorneys for Appellant.*

Geo. Rogers & Co., Printers, Chicago.

IN THE

# Supreme Court of the United States

CHARLES F. CHAMPION,
*Appellant.*

*vs.*

JOHN C. AMES, United States Marshal,
*Appellee.*

Number 860.

**Appeal from the Circuit Court of the United States For the Northern District of Illinois.**

# BRIEF OF APPELLANT.

## STATEMENT OF CASE.

On May 9, 1899, a complaint was made by G. H. Voss, before Lewis F. Mason, a United States Commissioner, at Chicago, charging appellant, C. F. Champion, W. F. Champion and Charles B. Park with conspiring to commit an offense against the United States, to-wit: For the purpose of disposing of the same, to cause to be carried from Dallas, Texas, to Fresno, California, certain papers, certificates and instruments, purporting to be, and representing tickets, chances, shares and interests in, and depending on the event of a lottery thereafter to take place, and offering prizes dependent on lot or chance; that said papers, certificates and tickets were deposited with, and carried by the Wells, Fargo

Express Company, a corporation engaged in carrying freight and packages over railways from Dallas, Texas, to Fresno, California, for hire. (Rec., 8-13.) Attached to and made a part of said complaint, are—

*First.* The indictment of the Grand Jury for the Northern District of Texas, being an indictment charging C. F. Champion, W. F. Champion and C. B. Park with substantially what they are charged in the body of the complaint. (Rec., 14.)

*Second.* The record of the case of *United States of America, appellant,* v. *C. F. Champion, appellee,* filed in the Circuit Court of Appeals of the Seventh Circuit. (Rec., 34 to 110.)

On the hearing of the said complaint, appellant, C. F. Champion, who was the only defendant arrested at Chicago, was ordered by said United States Commissioner to enter into a recognizance in the sum of $1,000 for trial before the United States District Court of Texas, at the next January term; in default of bail he was remanded to the custody of the Marshal. (Rec., 7.)

Thereupon he sued out a writ of habeas corpus before Judge Kohlsaat of the District Court, and said writ was made returnable before Judge Jenkins of the Circuit Court. (Rec., 1 to 7.)

The United States Marshal returned said writ, simply reciting that he had the petitioner in custody June 22, 1899, by virtue of the commitment of United States Commissioner Mason, and that the petitioner was subsequently (that is, between the issuance of the writ and the date of the Marshal's return) bailed by order of court. (Rec., 111.)

On the hearing of said petition by Judge Jenkins, it was adjudged that the writ be discharged and the petitioner remanded to the custody of the Marshal.

Champion thereupon perfected his appeal to this court.

In the court below both counsel for petitioner and for the Government argued the sufficiency of the evidence before the Commissioner, and the court in its opinion also passed upon the weight of the testimony. Since making up the record, however, a more careful investigation of the authorities has convinced us that the sufficiency of the evidence was a question for the Commissioner, and one which the court could not properly go into on *habeas corpus,* and hence this court, in its consideration of the case, can eliminate from the record all of the testimony and accompanying exhibits, and confine itself solely to the constitutional question raised by the petition.

The second and third paragraphs of the petition are as follows:

"*Second.* The offense which it is alleged in said indict-
"ment your petitioner and said other accused persons con-
"spired to commit, to-wit, the violation of section 1 of the
"act of Congress passed March 2d, 1895,—2 Supp. Revised
"Statutes United States, page 435,—is not such an offence
"as the Congress of the United States had the right to
"create, and that Congress exceeded its power in passing
"the said statute, in that such power was not conferred upon
"Congress by the Constitution of the United States, and such
"statute is null and void.

"*Third.* The statute last above mentioned, which created
"the offence which it is charged by said indictment and said
"complaint last filed before said Commissioner Mason, your
"petitioner, and said other accused persons, conspired to
"violate, is unconstitutional and void and contrary to the
"first amendment to the Constitution of the United States,
"in that the same abridges the freedom of the press." (Rec., 5.)

That the constitutional questions were fairly raised and argued, appears from the certificate of Judge Jenkins. (Rec., 122):

"I, James G. Jenkins, one of the judges of the Circuit "Court of the United States for the Seventh Judicial Cir- "cuit, do hereby certify that upon the hearing of the above "cause the construction and application of the first amend- "ment to the Constitution of the United States was fairly "raised by the petition of said petitioner for a writ of *habeas* "*corpus*, and was argued upon the hearing of the same, and "was by me determined.

"And I do further certify that the application of clause "3 of section 8 of article 1 of the Constitution of the United "States was fairly raised by the petition of said petitioner "for a writ of *habeas corpus*, and was argued upon the hear- "ing of the same and was by me determined.

"And that the power of the Congress of the United States "to pass section 1 of the act of March 2, 1895, 2 Supp. R. "S. U. S., 435, was fairly raised by the petition of said peti- "tioner for a writ of *habeas corpus*, and was argued upon "the hearing of the same, and was by me determined.

"And that the constitutionality of section 1 of the act of "March 2, 1895, 2 Supp. R. S. U. S., 435, was involved in "said above cause, and was argued by the respective counsel "upon the hearing of the same, and was by me determined."

The sole question, then for determination, is whether so much of Section 1 of the Lottery Act of March 2, 1895, as prohibits the sending of lottery matter and lottery advertisements from one state to another, by means other than the mails, is invalid because not authorized by, and in violation of the Constitution of the United States.

## Assignment of Errors Relied Upon.

1. By the record aforesaid it appears that the judgment aforesaid was given for the respondent and against the petitioner, whereas, by the law of the land, said judgment ought to have been given for said petitioner, Charles F. Champion, and against the said respondent.

2. The court erred in entering an order and judgment discharging the writ of *habeas corpus* and remanding petitioner to the custody of the respondent.

3. The court erred in not entering an order discharging petitioner upon said writ of *habeas corpus*.

4. The court erred in not holding and finding that that portion of Sec. 1 of the Act of March 2, 1895, 2 Supp. R. S. U. S., 435, which makes it an offense to carry from one state to another in the United States any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert, or similar enterprise offering prizes dependent upon lot or chance to be transferred from one state to another in the United States, is unconstitutional and void and in violation of the first amendment of the Constitution of the United States.

5. The court erred in not finding that the Congress of the United States was not empowered under and by virtue of paragraph 3 of Section 8 of Article 1 of the Constitution of the United States to pass and enact that portion of Section 1 of the Act of March 2, 1895, 2 Supp. R. S. U. S., 435, which makes it an offense to carry from one state to another in the United States, any paper, certificate, or instrument, purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lot-

tery, so-called gift concert, or similar enterprise offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert, or similar enterprise offering prizes dependent upon lot or chance to be transferred from one state to another in the United States.

6. The court erred in not finding and deciding that it was beyond the power of Congress to pass and enact that part of Section 1 of the Act of March 2, 1895, 2 Supp. R. S. U. S., 435, which makes it an offense to carry from one state to another in the United States any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert, or similar enterprise offering prizes dependent upon lot or chance to be transferred from one state to another in the United States, and that that portion of said statute was unconstitutional, null, and void.

7. The court erred in holding that the commissioner, Lewis F. Mason, had jurisdiction of the subject-matter in the proceedings before him, said commissioner, as set forth in the record herein.

8. The court erred in finding that said petitioner should not be discharged upon said writ of *habeas corpus* for the reasons set forth in the petition of said petitioner, alleging that he was unlawfully restrained of his liberty by the respondent, John C. Ames, United States Marshal.

I.

**That portion of Section 1 of the Lottery Act of March 2, 1895, which prohibits the transportation of lottery matter from one state to another, by means other than the mails, is unconstitutional and void.**

Appellant contends that Section 1 is unconstitutional, first, because paragraph 3 of Section 8 of Article 1 of the Constitution, which gives Congress the power "to regulate "commerce with foreign nations and among the several "states and with the Indian tribes," is not broad enough to authorize Congress to make a law prohibiting the transmission of lottery tickets and advertisements from one state to another, by means other than the United States mails; and, second, because the act is contrary to the first amendment to the Constitution, which provides that "Congress "shall make no law abridging the freedom of * * * the "press."

FIRST. THE ACT IS UNCONSTITUTIONAL BECAUSE IT IS NOT A REGULATION OF FOREIGN OR INTERSTATE COMMERCE.

What is the legitimate end sought by the act? Is it to regulate commerce between the states, or is it to regulate the morals of the people of the states? If the former, it is constitutional; if the latter, it is unconstitutional. Hence, it almost necessarily follows that Congress has made the regulation of commerce its *apparent purpose*.

We insist that (A) an analysis of the act, and (B) the evolution of lottery legislation in the United States, demonstrates to a certainty that the *real* purpose of Congress in the passage of this act was to regulate the morals of the people and to control and destroy the lottery business.

A.

An uninterrupted line of authorities supports the proposition that the test of the validity of a statute is its *real* and not its *apparent* object, and that its real object must be ascertained by determining whether the legitimate end sought is within the scope of the legislative power.

In *Yick Wo* v. *Hopkins*, 118 U. S., 356, where this court had under consideration the validity of an order of the City and County of San Francisco, which made it unlawful for any person to engage in the laundry business within the corporate limits "without first having obtained the consent of "the board of supervisors, except the same be located in a "building constructed of brick or stone," it was held that though its *apparent* purpose was to enact a police regulation, yet its actual enforcement showed that its *real* purpose was to drive the Chinese out of the laundry business. Hence, it was declared unconstitutional.

*Morgan R. R. Steamship Co.* v. *Louisiana*, 118 U. S., 455:

The plaintiff sought to restrain the Louisiana board of health from collecting certain quarantine fees provided for by an act of the Louisiana legislature, on the ground that said act was unconstitutional, among other reasons, because it was in violation of the commerce clause of the Federal Constitution. In discussing the case Justice MILLER says (p. 462):

"In all cases of this kind it has been repeatedly held that "when the question is raised whether the state statute is a "just exercise of state power, or is intended, by roundabout "means, to invade the domain of federal authority, this

"court will look into the operation and effect of the statute "to discern its purpose."

In *United States* v. *Fox*, 95 U. S., 670, wherein was involved the validity of that provision of the Bankrupt Act which made it an offense to obtain goods on credit by false pretenses three months before the petition in bankruptcy was filed, the court say:

"There is no doubt of the competency of Congress to pro- "vide, by suitable penalties, for the enforcement of all legis- "lation necessary or proper to the execution of powers with "which it is entrusted. * * * Any act committed with a "view of evading the legislation of Congress passed in the "execution of any of its powers, or of fraudulently securing "the benefit of such legislation, may properly be made an "offense against the United States, but an act committed "within a state, whether for a good or a bad purpose, or "whether with an honest or criminal intent, cannot be made "an offense against the United States unless it have some re- "lation to the execution of a power of Congress, or to some "matter within the jurisdiction of the United States. An act "not having any such relation is one in respect of which the "state can alone legislate."

*Minnesota* v. *Barber*, 136 U. S., 313:

This court held the Meat Inspection Law of Minnesota void, because of interference with interstate commerce. Justice HARLAN says (p. 326):

"Although this statute is not avowedly, or in terms, di- "rected against the bringing into Minnesota of the products "of other states, its necessary effect is to burden or obstruct "commerce with other states."

And, again, after reviewing a great many authorities, he says:

"Upon the authority of those cases and others that could "be cited, it is our duty to inquire in respect to the statute "before us, not only whether there is a real or substantial "relation between its avowed objects and the means devised "for obtaining those objects, but whether, by its necessary "or natural operation, it impairs or destroys rights secured "by the Constitution of the United States."

*Henderson* v. *Wickham*, 92 U. S., 259:

The statute of the State of New York requiring owners of vessels to give certain bonds before landing passengers, or pay a fixed sum for each passenger landed in lieu of such bonds, was held void. Justice MILLER says (p. 268):

"In whatever language a statute may be framed, its pur- "pose must be determined by its natural and reasonable ef- "fect; and if it is apparent that the object of this statute, "as judged by that criterion, is to compel the owners of ves- "sels to pay a sum of money for every passenger brought by "them from a foreign shore and landed at the Port of New "York, it is as much a tax on passengers, if collected from "them, or a tax on the vessel or owners for the exercise of the "right of landing their passengers in that city, as was the "statute held void in the *Passenger* cases."

The cases of *City of New York* v. *Miln*, 11 Pet., 103, and *The Passenger Cases*, 7 How., 283, also clearly illustrate the proposition. Moreover, the principle is recognized by this court in connection with this very statute, in the case of *In re Rapier*, 143 U. S., 110-133.

Applying this method of interpretation to the act in question, can there be the slightest doubt as to what was the *real*

purpose of Congress? Does the title of the act, "An Act for the Suppression of Lottery Traffic through National and Interstate Commerce," etc., deceive? Is it not clear that it is a palpable attempt on the part of the National Legislature to usurp the functions of the State Legislature? Can the act be construed as a legitimate regulation of commerce? Is the transportation from one state to another of any tangible thing, commerce?

Counsel for the government must concede that unless the statute alleged to have been violated by appellant, was enacted by Congress by virtue of the authority of the Commerce Clause of the Constitution, the act is a nullity. We maintain that no such authority was conferred upon Congress by this provision of the Constitution; that commerce, within the meaning of the Federal Constitution, does not include traffic in lottery tickets or transportation of lottery advertisements, and that there is no property in a lottery ticket so as to make it a subject of commerce; that traffic in lottery tickets is gambling, pure and simple, and not a regulation of inter-state commerce, but a subject wholly under the control of the several states of the Union.

These contentions naturally lead us, first, to an inquiry as to the definition and construction of the word "commerce," within the meaning of the Commerce Clause of the Constitution. In the Century Dictionary, "commerce" is defined to be "interchange of goods, merchandise or property of "any kind; trade, traffic; used more especially of trade on a "large scale carried on by transportation of merchandise "between different countries, or between different parts of "the same country."

"Commerce" has been often defined by this court. One of the most comprehensive definitions ever given, is that of Mr. Justice FIELD, in *Welton* v. *Missouri*, 91 U. S., 275: "Commerce is a term of the largest "import. It comprehends intercourse for the purposes of

"trade in any and all its forms, including the transporta-
"tion, purchase, sale and exchange of commodities between
"the citizens of our country and the citizens or subjects of
"other countries, and between the citizens of different
"states."

One of the most frequently quoted definitions is that of Chief Justice MARSHALL, in *Gibbons* v. *Ogden*, 9 Wheaton, 1: "Commerce undoubtedly is traffic, but it is something
"more; it is intercourse. It describes the commercial inter-
"course between nations and parts of nations, in all its
"branches, and is regulated by prescribing rules for carry-
"ing on that intercourse."

It is clear, however, that commerce, as used in the Constitution, is restricted to commercial intercourse. Even Webster, in his great argument in *Gibbons* v. *Ogden, supra*, recognizes that the constitutional phrase has its limitations. "It should be repeated," he says, "that the words used in
"the Constitution, 'to regulate commerce,' are so very gen-
"eral and extensive that they might be construed to cover a
"vast field of legislation, part of which has always been
"occupied by state laws; and therefore, the words must have
"a reasonable construction, and the power should be con-
"sidered as exclusively vested in Congress, so far, and so
"far only, as the nature of the power requires." (Page 14.)

Again this court has said in the *Trade Mark* cases, 100 U. S., p. 95:

"Every specie of property which is the subject of com-
"merce, but which is used, or even essential in commerce,
"is not brought by this clause within the control of Con-
"gress. The barrels and casks, the bottles and boxes in which
"alone certain articles of commerce are kept for safety and
"by which their contents are transferred from the seller to

"the buyer, do not thereby become subjects of congressional "legislation more than other property."

These definitions might be multiplied by citing from many other cases, but we deem it unnecessary. We have seen that there is no broader definition of commerce in the books than, "commercial intercourse." Hence, after all, the simple proposition can be stated thus: Is the sending of lottery tickets and lottery advertisements via express by a citizen of Texas to a citizen of California, "commercial intercourse?"

The solution of this question depends primarily upon whether a lottery ticket or a lottery advertisement is an *article of commerce*. The test to be applied as to whether a thing is subject of commerce, should be, "Is it a com- "modity?" "Has it a market or intrinsic value?" "Is "there any right of property in it?" "Is it a thing prop- "erly the subject of barter and sale?" It certainly can not be seriously contended that there is any right of property in a lottery ticket, or that such ticket is anything more than what it purports to represent, namely, an instrument or certificate representing a chance in the happening of a future event, to be determined by lot, wherein money or property may be drawn; in other words that it is speculation or gambling, whereby, by the investment of a small sum of money, the holder of such ticket may possibly become possessed of a larger sum or lose his entire investment made in the purchase of such ticket. It is nothing more than a voucher or receipt given by a lottery company that it will pay to the holder of such voucher or receipt a certain sum of money provided that at some subsequent drawing the number upon the purchaser's ticket shall be drawn.

In other words, it is but the evidence of a contract between the lottery company and the purchaser of the ticket. It has no intrinsic value as an article of merchandise; it has no value in and of itself, except that it is the printed evidence of a contract. If the lottery company refuses to carry out such contract, the ticket is at once worthless. There is no market for its sale as such, and it has no market value. It is not a commodity or an article of merchandise that is handled in the marts of trade.

While this court did not agree with the Supreme Court of Tennessee in the case recently decided of *Austin* v. *State of Tennessee*, that cigarettes were not articles of commerce, yet neither the majority opinion nor the dissenting opinion of Justice Brewer condemns the argument of the Tennessee court to the effect that there *are* tangible objects that are not articles of commerce. The following language taken from the opinion, met with no dissent in this court:

"Only those things which are in fact commodities in some "true sense, and, as such, are proper things for importa- "tion and use, can be legitimate articles of commerce, and "within the scope of the constitutional provision invoked "by the defendant in this case. Regulation of traffic in "things not suited for commerce was not by that provision "delegated to Congress."

*Austin* v. *State*, 101 Tenn., 563.

Illustrative of the proposition that a lottery ticket is not an article of commerce:

(*a.*) A railroad ticket is not an article of commerce. A railroad ticket is not merchandise; it is only a receipt or voucher for the payment of the passenger's fare, and is but

evidence of the contract of carriage between the railroad company and the passenger.

Ray's Neg. of Pass., Carriers, 198, 199, 494, 495.
2 Beach on Railways, Sec. 869.
*Commonwealth* v. *Wilson*, 14 Phil., 384-393.

(*b.*) An insurance policy is not an article of commerce. In *Paul* v. *Virginia*, 8 Wallace, 168, Justice FIELD says (p. 183):

"Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity "against loss by fire, entered into between the corporations "and the assured, for a consideration paid by the latter. "These contracts are not articles of commerce in any proper "meaning of the word. They are not subjects of trade and "barter offered in the market as something having an existence and value, independent of the parties to them. "They are not commodities to be shipped or forwarded from "one State to another, and then put up for sale."

In *Hooper* v. *California*, 155 U. S., 648, after having approvingly discussed the case of *Paul* v. *Virginia*, Justice WHITE says (p. 655):

"The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. "The making of such contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against 'the perils of the sea.'"

The same doctrine was adhered to with respect to a life insurance policy in

*New York Life Ins. Co.* v. *Cravens*, 178 U. S., 389, 401.

(*c.*) It has been held that the business of an interstate mercantile agency is not commerce. In a case involving the constitutionality of a law imposing certain taxes on mercantile agencies, where the law was attacked, among other reasons, for being an interference with interstate commerce, the Supreme Court of South Dakota, in an ably considered opinion, *State* v. *Morgan*, 2 S. D., 32, 53, held that the business of the R. G. Dun Mercantile Agency was not commerce. It was urged by the plaintiff in error (the agent of Dun's) that the agency was an instrument of commerce, but the court say:

"Information or intelligence is not an article of commerce, in any proper meaning of that word. Neither are "they subjects of trade and barter, offered in the market "as something having an existence and value independent of "the parties to them."

What is a lottery ticket but that which gives to its purchaser evidence or information that if a certain number that is stamped on the face of the ticket shall be selected at a subsequent drawing, he will be entitled to a certain sum of money? The ticket is of worth only if the number that it evidences is drawn. After the drawing, if that number draws no prize, the ticket has no value. Before the drawing and at the time of shipment, the ticket is worthless. If the numbers selected by those gambling in the result of the lottery could be tabulated by the lottery company without the aid of the tickets, the commercial aspect of the transaction, if any, would be the same as now.

(*d.*) A bill to foreclose a mortgage was filed in Alabama by a foreign corporation, and the Supreme Court, discussing the constitutional provision relative to foreign corporations and its relation to the Federal Commerce Clause, say:

"Money is not a commodity of barter and sale; or to be "put up and sold after being shipped. The loaning of money "by foreign corporations engaged in that business is not a "matter of interstate commerce."

*Nelms* v. *Edinburg-American Loan Mortgage Co.*, 92 Ala., 157-161.

In Prentice & Egan on the Commerce Clause of the Federal Constitution (p. 55), the authors say:

"The protection of the Constitution does not extend to "lotteries, games of chance or speculation. These may be "interstate gambling, but are not commerce. A state may "regulate or prohibit buying and selling what are commonly "known as 'futures'; may prohibit the sale of lottery tickets "or of bonds containing conditions which make their value "dependent upon chance. It may forbid the sale of pools "on horse races conducted without the State, although not "forbidden as to races conducted within the State, and may "forbid the sending of money without the State for gambling "purposes."

A great many cases are cited in the notes in support of the above.

The State of Illinois has had since 1847 a law making it a penal offense to operate a lottery or to sell, or have in one's possession with intent to sell, lottery tickets. Suppose that prior to the act of 1895 a citizen of New York, traveling by rail from New York to Chicago, had brought with him in his satchel a package of lottery tickets, with the intention of selling the package in Chicago. He is arrested by the State authorities, and charged with having in his possession a *package* of lottery tickets with the intention of selling the same in the State of Illinois. He interposes the defense that was made by Leisey in *Leisey* v. *Hardin*, 135 U. S., 100.

He contends that a package of lottery tickets, the same as a barrel of beer or a case of liquors, is a commercial commodity —an article of interstate commerce, and that the law of the State of Illinois denying him the right to bring within the State and sell such a package, is unconstitutional and void as being an unwarranted interference with interstate commerce. What would have been the judgment of this court? Would it have placed lottery matter in the same category with spirituous liquors, and have held that the lottery tickets were articles of interstate commerce?

Suppose, again, lotteries were legal in Illinois. Instead of selling lottery tickets, a number of persons were deputized to act as—let us say—lottery salesmen. A is authorized to sell *numbers* (not tickets) from 1 to 100; B from 100 to 200, etc. The drawing is held at Chicago. A goes to Indiana to sell his *numbers* from 1 to 100, and he succeeds in selling them to 100 different persons; the purchasers, however, receive nothing to evidence their purchases. A keeps a list of persons to whom he has sold numbers, showing the numbers sold to each person. He returns to Chicago, and this list guides the company in the distribution of its prizes. Has A been engaged in an act of interstate commerce?

Under this act, if a man living in Kansas City, Missouri, having his place of business in Kansas City, Kansas (the State line divides the city in two parts), should be reading a newspaper containing a lottery advertisement while riding in a street car from his home to his place of business, he would be guilty (not taking into consideration the element of the criminal intent). The language of the act is broad enough to include a newspaper so carried and to characterize it as an article of commerce.

B.

We insist that the evolution of Federal lottery legislation demonstrates that the purpose of Congress in passing the act of 1895 was not to regulate interstate commerce, but to destroy interstate lottery gambling. In an appendix to this brief, the court will find all of the lottery statutes enacted by Congress, beginning with the act of 1827, and ending with the act of 1895.

Until 1872 no penalty attached to sending lottery matter through the mails. Under that act, the fine was not less than $100, and not more than $500. This penalty, however, did not deter offenders, and in 1890 it was increased by adding the imprisonment clause, and for the first time the law prohibiting the sending of lottery matter through the mails became effective. Up to this time there was no pretense that the legislation was enacted for any other purpose than to keep the mails free from obnoxious matter; no pretense that there was an effort to regulate lottery traffic through foreign and interstate commerce. But it was found that though debarred from using the mails, the express companies were still open to the lotteries. Congress discovered that the stringent law of 1890 was easily circumvented.

In the meantime all of the States where lotteries were theretofore legally conducted, had, by constitutional enactments, prohibited lotteries, and the anti-lottery sentiment had developed so rapidly that Congress, in order to finally destroy the alleged evil, found it necessary to pass the comprehensive act of March 2, 1895, and was of necessity forced to take the false position that it was "An Act for the sup-"pression of lottery traffic through national and interstate "commerce."

SECOND. THAT PORTION OF THE FIRST SECTION OF THE ACT WHICH PROHIBITS THE TRANSPORTATION OF LOTTERY ADVERTISEMENTS BY MEANS OTHER THAN THE MAILS, IS UNCONSTITUTIONAL AND VOID, BECAUSE IT VIOLATES THE FIRST AMENDMENT TO THE CONSTITUTION IN ABRIDGING THE FREEDOM OF THE PRESS.

We insist that this act, in so far as it prohibits the transportation by any other method than through the mails, of lottery tickets and advertisements of a lottery, is contrary to the first amendment of the Constitution. We concede that under clause 7 of Section 8 of Article 1 of the Constitution, Congress has the power to exclude from the mails lottery tickets, advertisements of a lottery, etc., but that it can prohibit the transportation of such matter by an express company or by any other method we deny. Nor can it be contended that the power to prohibit the transmission of lottery matter is *incidental* to the power to regulate commerce, firstly, because the reasons already presented, demonstrate that lottery traffic is not commercial intercourse, and secondly, because of the direct inhibition of the first amendment.

We do not propose to enter into any extended discussion of this proposition, and shall content ourselves by calling the court's attention to the several authorities where the question has heretofore been considered.

We can well rest our claim that the act, as at present constituted, does abridge the freedom of the press, upon the decisions of this court in

*Ex parte Jackson*, 96 U. S., 727, and
*In re Rapier*, 143 U. S., 110.

In *ex parte Jackson, supra,* the question was whether Section 3894 of the Revised Statutes, which made it a penal offense to send letters or circulars concerning lotteries by mail, etc., was constitutional. Counsel for petitioners in the *Jackson* case, based their arguments largely on the views expressed by eminent statesmen during the congressional debates in 1836 relative to the exclusion of anti-slavery publications from the mails. Replying to this argument, Justice FIELD, in the opinion of the court, says (p. 735):

"Great reliance is placed by the petitioner upon these "views, coming, as they did in many instances, from men "alike distinguished as jurists and statesmen. But it is "evident that they were founded upon the assumption that "it was competent for Congress to prohibit the transporta- "tion of newspapers and pamphlets over postal routes in "any other way than by mail; and of course, it would fol- "low that if with such a prohibition, the transportation in "the mail could also be forbidden, the circulation of the "documents would be destroyed, and a fatal blow given to "the freedom of the press. But we do not think that Con- "gress possesses the power to prevent the transportation in "other ways, as merchandise, of matter which it excludes "from the mails. To give efficiency to its regulations and "prevent rival postal systems, it may, perhaps, prohibit the "carriage by others for hire, over postal routes, of articles "which legitimately constitute mail matter, in the sense in "which those terms were used when the Constitution was "adopted—consisting of letters and of newspapers and "pamphlets, when not sent as merchandise; but further "than this its power of prohibition can not extend."

And again on page 733:

"Nor can any regulations be enforced against the trans- "portation of printed matter in the mail, which is open to

"examination, so as to interfere in any manner with the "freedom of the press. Liberty of circulating is as essen- "tial to that freedom as liberty of publishing; indeed, with- "out the circulation, the publication would be of little value. "If, therefore, printed matter be excluded from the mails, "its transportation in any other way can not be forbidden "by Congress."

The *Jackson* case was decided in 1877, and arose under the Act of 1876. After the Act of 1890 was passed, its constitutionality was tested in the case of *in re Rapier, supra.* This latter case was argued by the respective counsel at great length, and the court was asked to overrule the decision in *ex parte Jackson, supra.* Chief Justice FULLER, delivering the opinion of the court, said (p. 133):

"The question for determination relates to the constitu- "tionality of Section 3894 of the Revised Statutes as amend- "ed by that act. In *ex parte Jackson*, 96 U. S., 727, it "was held that the power vested in Congress to establish "post-offices and post-roads embraced the regulation of the "entire postal system of the country, and that under it "Congress may designate what may be carried in the mail "and what excluded; that in excluding various articles from "the mails the object of Congress is not to interfere with "the freedom of the press or with any other rights of the "people, but to refuse the facilities for the distribution of "matter deemed injurious by Congress to the public morals; "and that the transportation in any other way of matters "excluded from the mails would not be forbidden. Unless "we are prepared to overrule that decision, it is decisive of "the question before us." * * *

(P. 135.) "In short, we do not find sufficient grounds "in the arguments of counsel, able and exhaustive as they "have been, to induce us to change the views already ex- "pressed in the case to which we have referred. We adhere "to the conclusion therein announced."

Not only do these decisions show that the court throughout based its opinions upon the fact that all sources other than the mails were open for the circulation of lottery advertisements, but the arguments of counsel for the government proceeded upon that theory. In the argument of Attorney General Miller, in the *Rapier* case, appear the following statements, remarkable in the light of the present act. (We quote from the arguments as published in 143 U. S., L. C. P. Co. Ed., as the Attorney General's argument does not appear in the Davis Edition):

"The main effort," said the Attorney General, "of coun-
"sel for petitioners, in each of the briefs, seems to be to
"becloud the issue. To this end their arguments assume that
"the refusal of the general government to be the instru-
"mentality for the circulation of lottery literature, is the
"same thing as forbidding the publication or circulation
"of such literature. The only escape from a violation of
"the prohibition in the first amendment to the Federal Con-
"stitution against making a law abridging the freedom of
"the press, is for every official of the post-office department
"to become the servant, and every carrier the errand boy
"of the Louisiana Lottery Company.

"They totally ignore the fact that the sole effect of the
"act of Congress is, that the general government, its offi-
"cers, employes and agencies, shall in no way aid or abet
"this business; that its mail bags and the hands of its serv-
"ants, shall not be used in spreading and manipulating
"snares for its unwary victims; that it simply says to Fed-
"eral officials, 'Hands off.'" (p. 98.)

Again on page 100:

"Seriously, is it not too plain for argument that under
"this first amendment to the Constitution, Congress does
"its whole duty to the press when it fails to put any re-

" striction whatever upon the printing, publication or circu-
" lation thereof, by those interested therein, through such
" private agencies as they are able to command? It is sub-
" mitted that no question under the first amendment of the
" Constitution is in issue in this case, nor can be in issue,
" so far as the Louisiana Lottery is concerned, until a stat-
" ute shall be passed forbidding, not merely the circulation
" of papers carrying its advertisements through the mails,
" but forbidding the circulation of such newspapers through
" any agency whatsoever."

Assistant Attorney General Maury, on page 102, concluded his argument thus:

" The exclusion of newspapers from the mails, which con-
" stitute but one means of circulation, is not an abridgement
" of the freedom of the press, all other means of circulation
" being left open to them."

In the opinion of Judge JENKINS, found on page 103 of the record in this case, he says:

" In considering the constitutionality of this act of Con-
" gress I have read the opinion in the case cited, *France* v.
" *United States*, 164 U. S., 676, in which the Supreme Court
" declined to pass upon its constitutionality. I have care-
" fully considered the matter, and I think it fairly a debat-
" able and doubtful question whether the act will be held
" to be constitutional."

We respectfully submit that the judgment of the lower court should be reversed and the petitioner discharged.

MORITZ ROSENTHAL,
JOSEPH B. DAVID,
*Attorneys for Appellant.*

## APPENDIX.

Act of 1827 (March 2, 1827) (4 Stat. L., 238, Sec. 6):

"That no postmaster or assistant postmaster shall act as "agent for lottery offices or under any color of purchase, or "otherwise, send lottery tickets; nor shall any postmaster "receive free of postage or frank lottery schemes, circulars "or tickets."

Act of 1868 (July 27, 1868) (15 Stat. L., 194-196, Sec. 13):

"That it shall not be lawful to deposit in a post-office, to "be sent by mail, any letters or circulars concerning lotteries, "so-called gift concerts or similar enterprises, offering prizes "of any kind on any pretext whatever."

Act of 1872 (June 8, 1872) (17 Stat. L., 302):

"Sec. 3894. No letter or circular concerning illegal lot- "teries, so-called gift concerts, or other similar enterprises, "offering prizes, or concerning schemes devised and intended "to deceive and defraud the public for the purpose of ob- "taining money under false pretences, shall be carried in "the mail. Any person who shall knowingly deposit or send "anything to be conveyed by mail in violation of this section "shall be punishable by a fine not more than five hundred dol- "lars nor less than one hundred dollars, with costs of prose- "cution."

Act of 1876 (July 12, 1876) (19 Stat. L., 90, Sec. 2):

Section 3894 (as above) was amended by striking out the word "illegal."

Act of September 19, 1890 (1 Supp. Rev. St., 803):

"Be it enacted, etc., that section thirty-eight hundred and "ninety-four of the Revised Statutes be, and the same is "hereby amended to read as follows:

"Sec. 3894. No letter, postal card or circular concerning "any lottery, so-called gift concert, or other similar enter- "prise offering prizes dependent upon lot or chance, or con- "cerning schemes devised for the purpose of obtaining money "or property under false pretenses, and no list of the draw- "ings at any lottery or similar scheme, and no lottery ticket, "or part thereof, and no check, draft, bill, money, postal note "or money order for the purchase of any ticket, tickets or "part thereof, or of any share or any chance in any such "lottery or gift enterprise shall be carried in the mail or de- "livered at or through any post-office or branch thereof, or by "any letter carrier.

"Nor shall any newspaper, circular, pamphlet or publica- "tion of any kind containing any advertisement of any lot- "tery or gift enterprise of any kind offering prizes depend- "ent upon lot or chance, or containing any list of prizes "awarded at the drawings of any such lottery or gift enter- "prize, whether said list is of any part or of all of the draw- "ing, be carried in the mail or delivered by any postmaster "or letter carrier.

"Any person who shall knowingly deposit or cause to be "deposited, or who shall knowingly send or cause to be sent, "anything to be conveyed or delivered by mail in violation of "this section or who shall knowingly cause to be delivered by "mail anything herein forbidden to be carried by mail, shall "be deemed guilty of a misdemeanor, and on conviction "shall be punished by a fine of not more than five hundred "dollars or by imprisonment for not more than one year, or "by both such fine and imprisonment for each offense."

Act of March 2, 1895 (2 Supp. Rev. St., 435):

Chap 194. An Act for the Suppression of Lottery Traffic Through National and Interstate Commerce and the Postal Service Subject to the Jurisdiction and Laws of the United States.

"Be it enacted, etc., that any person who shall cause to "be brought within the United States from abroad, for the "purpose of disposing of the same, or deposited in or carried "by the mails of the United States, or carried from one state "to another in the United States, any paper, certificate or in- "strument purporting to be or represent a ticket, chance, "share or interest in or dependent upon the event of a lot- "tery, so-called gift concert, or similar enterprize, offering "prizes dependent upon lot or chance, or shall cause any ad- "vertisement of such lottery, so-called gift concert or sim- "ilar enterprise, offering prizes dependent upon lot or chance, "to be brought into the United States, or deposited in or car- "ried by the mails of the United States, or transferred from "one state to another in the same, shall be punishable in the "first offense by imprisonment for not more than two years "or by a fine of not more than one thousand dollars, or both, "and in the second and after offenses by such imprisonment "only."

No. 106 & 2

Br. of Guthrie for Appellant.

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# Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 106.

CHARLES F. CHAMPION,
*Appellant,*

*vs.*

JOHN C. AMES, United States Marshal.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

## BRIEF ON BEHALF OF APPELLANT.

(FEDERAL REGULATION OF LOTTERIES.)

WILLIAM D. GUTHRIE,
*Of counsel for appellant.*

WASHINGTON, February, 1901.

[17,474.]

1402

# Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 106.

CHARLES F. CHAMPION,
*Appellant,*

*vs.*

JOHN C. AMES, United States Marshal.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF ON BEHALF OF APPELLANT.

The question presented by this appeal is as to the constitutional power of Congress to prohibit and punish as for a crime any one who shall cause to be "carried from one state to another in the United States, any paper, certificate or instrument purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert, or similar enterprise offering prizes dependent upon lot or chance, to be . . . transferred from one state to another in the same," as provided in the act of March 2, 1895, c. 191, § 1; 28 Stat. 963. Section 1 of the act reads as follows:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, or deposited in or carried by the mails of the United States, or carried from one State to another in the United States, any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or

> dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, to be brought into the United States, or deposited in or carried by the mails of the United States, or transferred from one State to another in the same, shall be punishable in the first offense by imprisonment for not more than two years, or by a fine of not more than one thousand dollars, or both, and in the second and after offenses by such imprisonment only."

In the case at bar, the overt act charged in each count of the indictment is the delivery in the state of Texas of a box containing lottery tickets, papers or certificates to the Wells-Fargo Express, a corporation engaged in carrying freight and packages, for the purpose of having the box carried to Fresno, in the state of California, or to Ogden, in the state of Utah (record, pp. 15, 23). The offence charged is that the attempt to have lottery tickets, papers or certificates carried or transferred from one state to another is a crime constituted such by virtue of the above statute.

The statute in question purports to regulate three distinct and separate branches of the subject of lotteries, viz.: (1) bringing lottery tickets, etc., within the United States from abroad; (2) depositing any such matter in the mails of the United States, and (3) carrying or transferring such matter from one state to another in the United States by means or medium other than the mails.

The first branch involves the regulation of our relations with foreign countries, the second involves the regulation of the United States mails, and the third is an attempt to regulate intercourse among the people of

the respective states in a matter which, it is submitted, does not constitute commerce within any proper meaning of that term.

I.

As to the first branch of this statute, it may well be conceded that Congress, under the plenary power to regulate our relations with foreign countries, may exclude persons, commodities or printed matter of any nature whatsoever, whether or not relating to or connected with commerce. In this case, it is not necessary in the slightest degree to challenge the power of Congress—the legislative power of a sovereign nation—to exclude foreign persons or commodities or printed matter in its judgment and discretion. When we say that Congress may exclude or deport foreigners or their products or publications from the United States, we are but recognizing the ancient doctrine of international law that an alien or an alien's property comes into the territory of a sovereign nation only by its sufferance, and may be excluded at its will. And whether the exclusion be for the purpose of self-defense, or for the general welfare of the people, or as an incident to the regulation of imports, the right to exclude or deport is as much a part of the sovereign's prerogative as is the right to make treaties giving to foreigners the privilege of abiding or of bringing or selling their goods or publications within the sovereign's domain. That this attribute of sovereignty has been surrendered by and does not belong to the states cannot for a moment be doubted, for the states are forbidden to enter into any form of treaty[1]; nor can it be questioned that the whole power to regulate every form of relations with foreign countries must of necessity reside in the

[1] Section 10 of Article I of the Constitution of the United States.

sovereign newly created by the Constitution of the United States.[1]

As Mr. Justice Gray said in *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 659;

> "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. Vattel, lib. 2, §§ 94, 100; 1 Phillimore (3d ed.), c. 10, § 220. In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war."

And in the subsequent case of *Fong Yue Ting* v. *United States*, 149 U. S. 698, 707, Mr. Justice Gray again said:

> "The right of a nation to expel or deport foreigners who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."

Many of the considerations which are of a national character and which come up between the United States as a sovereignty and foreign nations wholly disappear when we contemplate interstate relations. We must recognize that the nature and source of the power to regulate domestic commerce is far different from the nature and source of the power to regulate international commerce. In the case of interstate commerce, there is no implied power in Congress. In the case of foreign commerce, there is no limitation upon the power of Congress and no implied or reserved power in the states. When regulating inter-

[1] *Head Money Cases*, 112 U. S. 580, 591.

state commerce, the only power Congress exercises is that expressly delegated by the states, and it is limited and hedged in by the local police and municipal powers reserved to the states. When regulating commerce or intercourse with foreign nations, the extent of the power delegated to the federal government is as unlimited as that of any other sovereignty. It rests not merely on the commerce clause, but on the power to lay duties and imposts, to make treaties, to provide for the common defense, to wage war, etc. But when considering a statute regulating interstate commerce, we must realize that the exercise of power in the given case must not trench upon "the powers not delegated to the United States by the Constitution," but by that instrument expressly "reserved to the states respectively or to the people"[1]— considerations and limitations which may have little or no weight in regulating foreign affairs.[2]

Under the regulation of what is generally termed foreign commerce or intercourse, Congress has ample power not only to prevent the introduction of foreign lottery matter, but in order to render such inhibition effective, it may prohibit the possession of such matter or its transfer from one state to another just as fully as it may prohibit the possession or transfer of smuggled imports or contraband goods. In the case at bar, however, the offense of bringing lottery matter from abroad is not charged in the indictment, and is not presented for adjudication.

The earliest acts of Congress in regard to the introduction of goods into this country were acts imposing duties on imports—which were laid upon all goods quite irrespective of their commercial qualities—and acts inci-

[1] Tenth Article of Amendment to the Constitution of the United States.

[2] Indeed, Madison placed the power to regulate intercourse with foreign nations in a class distinct and separate from the power to regulate interstate commerce. The Federalist; Hamilton's Works, Lodge's ed., vol. 9, pp. 250, 258, 262.

dentally affecting the goods while primarily regulating the carrying trade. Carrying goods was obviously as much commerce, and as subject to commercial regulation, as the carrying of passengers. To promote the carrying trade, registration of vessels of the United States has been provided for with rules for their construction, equipment and transfer. And in regulating maritime contracts under the power over foreign commerce and admiralty jurisdiction, Congress has punished the theft of shipwrecked goods even when they have been washed ashore, has revised the liability of shipowners and incidentally determined the validity of exemptions from liability in bills of lading.[1] So, also, in order to promote the export trade in live-stock, regulations have been made to prevent the exportation of diseased cattle.[2] Provision, too, has been made for the inspection of imported meat; an act forbids the importation of poisonous food and infected animals, and provides for the total suspension of importation of animals whenever "it shall be necessary for the protection of animals in the United States against infectious or contagious diseases."[3] In so far as these regulations are more than regulations of the carrier, they are in furtherance of foreign traffic in the goods in question. A possible exception may be the act of August 30, 1890; but that was passed, not under the commerce clause, but as an auxiliary of the power to regulate import duties, and to say what goods shall or shall not be free; and the object of the act is to provide that no detriment shall come to the states by reason of the enforced admission of foreign goods within their borders.

Turning to commerce between the states, we find that Congress no longer regulates it in conjunction with its

[1] Act of February 13, 1893, c. 105; 27 Stat. 445; R. S. 4285; *Lord* v. *Steamship Co.*, 102 U. S. 541; cf. *People* v. *Raymond*, 34 Cal. 492.

[2] Act of May 29, 1884, c. 60, §§ 4, 5; 23 Stat. 31.

[3] Act of August 30, 1890, c. 839, § 9; 26 Stat. 416.

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powers over foreign relations or with its power over imports. Articles brought for sale from one state to another are not imports.[1] In regulating interstate commerce pure and simple, Congress has busied itself principally with laying down the law for carriers, as in regulating rates and placing them under the direct supervision of the interstate commerce commission.[2] Such also are acts regulating bridges,[3] telegraphs[4] and the coasting trade.[5]

In connection with this point, a legislative episode of 1836 may be mentioned in which an attempt was made to prevent the circulation of anti-slavery publications from one state to another by excluding them from the United States mails. For a number of years the circulation of such documents had caused bitter feeling in the southern states; and in 1835 the governor of North Carolina, in his address to the legislature, had urged the adoption of stringent provisions against the circulation of these publications, and had advocated a union of the slave states to protect themselves against this "pest".[6] In

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[1] *Woodruff* v. *Parham*, 8 Wall. 123.

[2] *Railroad Company* v. *Fuller*, 17 Wall. 560; *Railroad Company* v. *Richmond*, 19 Wall. 584; *Phila. Steamship Co.* v. *Pennsylvania*, 122 U. S. 326; *McCall* v. *California*, 136 U. S. 104; *Norfolk, etc., Railroad Co.* v. *Penn.*, 136 U. S. 114; *Crutcher* v. *Kentucky*, 141 U. S. 47; *Carlon* v. *Illinois Central Railroad*, 59 Iowa 148.

[3] *Luxton* v. *North River Bridge Co.*, 153 U. S. 525; *State of Pennsylvania*, v. *Wheeling and Belmont Bridge Co.*, 18 How. 421; *The Clinton Bridge*, 10 Wall. 454; *South Carolina* v. *Georgia et al.*, 93 U. S. 4; *Bridge Co.* v. *U. S.*, 105 U. S. 470; *Miller* v. *Mayor of New York*, 109 U. S. 385; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Fargo* v. *Michigan*, 121 U. S. 230.

[4] *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1; *Telegraph Co.* v. *Texas*, 105 U. S. 460; *W. U. Telegraph Co.* v. *Pendleton*, 122 U. S. 347; *Ratterman* v. *Western Union Tel. Co.*, 127 U. S. 411; *Leloup* v. *Port of Mobile*, 127 U. S. 640.

[5] *Sinnot et al.* v. *Davenport et al.*, 22 How. 227; *Foster et al.* v. *Davenport et al.*, 22 How. 244; *The Daniel Ball*, 10 Wall. 557; *Moran* v. *New Orleans*, 112 U. S. 69.

[6] 49 Niles' Register, 228.

many of the southern states laws existed prohibiting all circulation of anti-slavery documents, whether they came from another state or not.[1] The general impression which prevailed in the South was that these regulations applied even to the United States postmasters, and rendered them liable to conviction for delivering the publications of the anti-slavery societies. Some postmasters, both in the North and South, excluded these publications from the mails that passed through their offices, and Kendall, the Postmaster General, though unable to find authority justifying him in ordering such action, intimated that in their position he should pursue a similar course.[2] In 1835, President Jackson, in his message, recommended that a bill be passed excluding these publications from the mails. This message was referred to a select committee, and on the 4th of February, 1836, a bill was reported by Mr. Calhoun making it a penal offense to transmit by the mails all anti-slavery documents which were prohibited by the states to which they were addressed. His doctrine was that Congress had no power under any clause of the Constitution to forbid directly the transmission of these publications, that Congress had no power to interfere with the internal regulations of the states, but that in furtherance of the police regulations of the several states, Congress might exclude from the mails papers which were condemned by those police regulations.[3] Buchanan placed his support of the bill on higher grounds, and thought that, under the power of Congress to regulate the mails, it might exclude from the mails whatever it saw fit, and in

[1] North Carolina, 1830, Laws, vol. 14, p. 10, and Maryland, 1831; 49 Niles' Register, 228. Cf. Rev. Sts. La. 1852.

[2] 48 Niles' Register, 447-448; 49 Niles' Register, 7-8.

[3] Cong. Globe, 24th Cong., 1st Sess., 10, 164, 165, 347.

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the bill under discussion, he agreed to the adoption of state laws, not as a source of power, but as a convenient test of what publications should be held incendiary.[1] The opposition to the bill was based upon constitutional as well as political grounds. The constitutional objection made was that it abridged the freedom of speech and of the press. This was the ground taken by Davis of Massachusetts[2] and by Webster.[3] On the 8th of June the bill was rejected by a vote of 25 to 19.[4]

The significance of this episode lies in the fact that Congress was grappling with the proposition to regulate the transmission from state to state of documents which lacked entirely the quality of merchandise. It was admitted throughout the debate that if Congress could not regulate this matter indirectly through the mails it could not regulate it at all; and no suggestion was made throughout the debate that such a bill could be passed under the commerce clause.[5]

From this general review of the subject, it must be clear that the word "commerce," although construed broadly when it is used in a grant of sovereign power with respect to foreign relations, should be construed strictly when applied purely to interstate relations, and that there is no authority for saying that interstate commerce includes the mere transit from state to state of an individual or the mere carriage or transfer of an article which is not a subject or article of commerce.

It has not been necessary for this court in any case yet arising to consider and analyze in juxtaposition the power

[1] Cong. Globe, 24th Cong., 1st Sess., App. 454.
[2] " " " 348.
[3] " " " App. 453.
[4] " " " 539.
[5] We say this, fully aware of the other view taken by Mr. Justice Field in Jackson's case, 96 U. S. 727. We find no support for his view in the debate.

to regulate foreign affairs, commerce and intercourse on the one hand and the power to regulate interstate commerce on the other. The difference has been as yet only commented on, but it is obviously great and broad. The present case may be deemed to present that interesting question, and perhaps may lead to the declaration of a sound doctrine that in the one case the power of the legislative branch of the sovereign nation is practically absolute, whilst in the other case the federal legislative power is necessarily limited by the nature and essence of the reserved powers in the states, and by the extremely delicate machinery of our system of dual government.

Referring to the difference between the power to regulate foreign commerce and the power to regulate interstate or domestic commerce, Mr. Randolph, in his recent excellent work on "The Law and Policy of Annexation" uses the following language (pp. 94-98):

> "Now the power conferred in respect of foreign, Indian, and interstate or domestic commerce is in each case 'to regulate,' and from this identity in the terms of the grants it has been assumed that the three powers are co-extensive. But it will not be difficult to show that the power over domestic commerce is not identical with the power over commerce with foreign nations,[1] and with the Indians. The assertion of identity between the powers over domestic and Indian commerce may be dismissed almost summarily. The Indian tribes are, in the language of Chief Justice Marshall, 'in a state of pupilage. Their relation to the United States resembles that of a ward to its guardian. They look to our Government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father."[2] Whatever relation the people of the United States may bear to the

[1] See Madison's Works, IV, 15; *Groves* v. *Slaughter*, 15 Peters, 449, 505.

[2] *The Cherokee Nation* v. *The State of Georgia*, 5 Peters, 1, 17.

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Federal Government it is not this. The dependent position of the Indians justified the Supreme Court in saying: 'As long as these Indians remain a distinct people, with an existing tribal organization, recognized by the political department of the Government, Congress has the power to say with whom and on what terms they shall deal, and what articles shall be contraband.'[9] Whatever power Congress may have over domestic commerce, it is not this. It is a fair rule of interpretation that, when powers in respect of several subjects are assumed to be co-extensive merely because of identity in the terms of the grants, the differentiation of one subject discredits the assumption as to the rest. But we need not stop here; for, in point of fact, the assumed parallel between domestic and foreign commerce is quite as illusory as in the case of Indian trade, and for the same reason—a radical difference in the status of the parties.

"The United States deal with a foreign nation as one sovereign with another. They have no connection, and, apart from the obligation of treaties, no conventional relation with the foreign state. Their attitude toward other nations is dictated by policy, tempered in some directions by treaty and international law; and they may discriminate between them—inclining toward one and away from another—as their interests require.

"If Congress may interdict foreign commerce, it is by way of carrying out the policy of a sovereign—the United States—in opposition to, or disregard of the policy of other sovereigns to whom it owes no legal duty in the premises.

"Obviously a right to interdict, which may inhere in the power to regulate commerce with foreign or dependent nations cannot be attributed by analogy to the power to regulate our own. Because we may forbid intercourse with a foreign nation, essentially an unfriendly act despite any protestation to the contrary, and forbid private dealings with Indians in order to protect childish wards from the rapacity of traders, it does not follow that we may turn the

[9] *U. S. v. 43 Gallons of Whiskey, etc.*, 93 U. S. 188, 195.

weapon of embargo against our own countrymen, or treat them as children of a 'great father.'

"In fact, the need of commercial unity was the greatest incentive to the establishment of 'the more perfect Union' assured by the Constitution. The States did not transfer to Congress the sovereign power of restriction which each possessed. They renounced these powers, left them in the air, and authorized Congress to maintain the freedom of trade established by their renunciation. To regulate domestic commerce, then, is to facilitate an intercourse placed beyond reach of prohibition, and, while regulations may in fact involve some restraint upon the conduct of particular intercourse, they have their warrant and purpose in the facilitation of all intercourse."

II.

As to the second branch of the statute, which involves the power to exclude lottery tickets, advertisements, etc., from the United States mails, it is sufficient to say that this portion of the statute has been upheld on the ground of the exclusive and comprehensive power vested in Congress to establish post offices and post roads, which embraces the regulation of the entire postal system of the country. Under this broad and almost unlimited power, Congress can designate what shall be carried in the mails and what shall be excluded. This point was settled by the decisions of the court in *Ex parte Jackson*, 96 U. S. 727, 732, and *In re Rapier*, 143 U. S. 110, 133.

III.

As to the third branch of the statute, which involves the power of Congress to forbid the carriage or transfer of lottery tickets, advertisements, etc., from state to state, it is to be at once observed that although the point has not yet been expressly adjudicated, this court has nevertheless said that no such power exists. Thus, in *Ex*

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*parte Jackson*, 96 U.S. 727, 735, Mr. Justice Field, delivering the unanimous opinion of the court, said:

> "But we do not think that Congress possesses the power to prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails. To give efficiency to its regulations and prevent rival postal systems, it may perhaps prohibit the carriage by others for hire, over postal routes, of articles which legitimately constitute mail matter, in the sense in which those terms were used when the Constitution was adopted, consisting of letters, and of newspapers and pamphlets, when not sent as merchandise; but further than this its power of prohibition cannot extend."

And in the subsequent case of *In re Rapier*, 143 U. S. 110, 133, Mr. Chief Justice Fuller, delivering again the unanimous opinion of the court, stated that the former case had held "that the transportation in any other way of matter excluded from the mails would not be forbidden."

That question is now distinctly presented for adjudication, and the following argument is submitted in support of the contention that the court should adhere to the view expressed by Mr. Justice Field. The court below considered it a debatable and doubtful question whether the act would be held constitutional by this court (Jenkins, C. J., record, p. 103).

IV.

The portion of the act of March 2, 1895, with which we are now concerned, does not regulate any commerce in the sense in which that word is used in the Constitution of the United States. The first portion relating to foreign lotteries, forbids the introduction into the United States of any paper concerning lotteries "for the purpose of disposing of the same." Admitting, for the purpose of argument, that this provision is a regulation of traffic in such

papers, within the scope of the power of Congress to control our relations with foreign countries, we find that the remainder of the act provides simply against the passing from state to state, by the mails or by any other means, of any lottery ticket or advertisement without any reference whatever to any "purpose of disposing of the same." In so far as this provision is aimed against the transit of the paper, it deals with no commerce. Nor is it a regulation of a carrier, whose business is commerce irrespective of what it carries. A thing that is not in itself a subject or article of commerce, cannot surely become invested with a commercial character by being transferred from one state to another. The paper does not become commercial simply because in furtherance of an interstate business. It is merely in furtherance of a lottery, and a lottery is not commerce.

In so far as the law is aimed against the lottery business, either at the place where the paper started or delivery was made, or at the place where the paper will find itself, or where the contract may take effect at the end of its journey, it is an attempt to interfere with the local police regulations of either place. The lottery business, wherever found, is not interstate commerce. It is true that the lottery business, which was once extensively engaged in, has gradually fallen into disrepute, and that the states, in the exercise of their police powers, have one by one prohibited them, and in aid of this prohibition passed laws forbidding the introduction of advertisements and papers from other states. But the gradual condemnation of lotteries did not make the business interstate commerce if it was not so before, or diminish the power of the respective states to permit, regulate or prohibit them. If the change had any effect, it must have been the reverse.

A conviction for selling lottery tickets for the national lottery, authorized by the act of Congress of May 4, 1812, was sustained under the statute of Virginia in the case of *Cohens* v. *Virginia*, 6 Wheat., 264. The state statute in that case forbade the sale within the state of any ticket in a lottery not authorized by the laws of Virginia. The main argument in the case was devoted to the question whether the lottery was not a fiscal agent of the Government with which no state could interfere, and the court held that it was not. Chief Justice Marshall regarded the law as a penal regulation, having for its sole object the internal government of the state. Yet if the lottery ticket had been an article of commerce, the Virginia act would obviously have been invalid.[1]

The primary and fundamental inquiry upon the merits is, therefore, whether a lottery ticket or policy or advertisement is or is not an article of commerce or constitutes in any sense a transaction of interstate or domestic commerce within any proper meaning of the word.

As was said by Mr. Justice Miller in the *Trade-Mark Cases*, 100 U. S. 82, 96:

> "When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several States, or with the Indian tribes. If not so limited, it is in excess of the power of Congress."

Transactions connected with lotteries do not constitute a part of the commerce between the states any more, for example, than issuing a policy of insurance, which is an analogous form of wagering contract.

In the case of *Paul* v. *Virginia*, 8 Wall. 168, 183, it was distinctly held that the sending of insurance policies,

[1] *Welton* v. *State of Missouri*, 91 U. S. 275; *Webber* v. *Virginia*, 103 U. S. 344.

say from New York to Virginia, to be there delivered to the insured on payment of premium, was not interstate commerce. The remarks and reasoning of the court, by Mr. Justice Field, apply as much to a lottery policy or ticket as to a policy of insurance, viz.:

> "Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the states any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

Again, in *Hooper* v. *California*, 155 U. S. 648, 653, 655, Mr. Justice White said:

> "Whilst it is true that in *Paul* v. *Virginia*, and in most of the cases in which it has been followed, the particular contract under consideration was for insurance against fire, the principle upon which these cases were decided involved the question of whether a contract of insurance, of any kind, constituted interstate commerce. The court in reaching its conclusion upon this question was not concerned with any matter of distinction between marine and fire insurance, but proceeded upon a broad analysis of the

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nature of interstate commerce and of the relation which insurance contracts generally bear thereto. . .

"The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against 'the perils of the sea.'"

And, in *New York Life Insurance Co.* v. *Cravens*, 178 U. S. 389, 401, Mr. Justice McKenna said:

"Is the statute an attempted regulation of commerce between the States? In other words, is mutual life insurance commerce between the States?

"That the business of fire insurance is not interstate commerce is decided in *Paul* v. *Virginia*, 8 Wall. 168; *Liverpool Ins. Co.* v. *Mass.*, 10 Wall., 566; *Phila. Fire Asso.* v. *New York*, 119 U. S. 110. That the business of marine insurance is not is decided in *Hooper* v. *California*, 155 U. S. 648. In the latter case it is said that the contention that it is 'involves an erroneous conception of what constitutes interstate commerce.'

"We omit the reasoning by which that is demonstrated, and will only repeat, 'The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against the 'perils of the sea'.' And we add, or against the uncertainty of man's mortality."

A lottery contract is, in all its aspects, of the same nature as an insurance contract. They are both aleatory. An aleatory contract is one whose fulfillment depends on a future and uncertain event. Such are contracts of annuity, insurance, lottery and other forms of gambling. In the case of insurance, the company or underwriter says, "If by a future casualty your house, your barn or your ship be lost, we will pay you so much." The lot-

tery company similarly says, "If a certain number be drawn, we will pay you so much."

It cannot be denied that insurance policies are essentially wagers and constitute aleatory contracts substantially the same as the contract of lottery. Both forms of contract depend upon chance and uncertain events, and in principle cannot be distinguished in their nature.[1]

If, therefore, insurance policies, although connected with property which is the subject matter of interstate or foreign commerce, be not commerce within the true meaning of the Constitution of the United States, it must logically follow that the other forms of aleatory contracts, such as lottery tickets or policies, likewise, do not come within the scope of the commerce clause.

This court having definitely settled that a state regulation of the business of interstate or foreign insurance is not a regulation of commerce, does it not logically follow that the court could not uphold an act of Congress which attempted to regulate insurance or, for example, to forbid the carriage or transfer of insurance policies or tickets or other printed matter from state to state by agencies other than the mails? Would it not be held that any such statute was not a regulation of interstate commerce in any proper meaning of the term and that the power to regulate insurance as well as other forms of business intercourse had not been delegated to Congress? It is true that it is now desirable and expedient to have Congress regulate the

[1] Pothier's Obligations, Evans' Transl., vol. I., pp. 9–10; Louisiana Civil Code, act 1776; Civil Code of Spain of 1889, Title XII., U. S. Govt. Transl. 1899, pp. 230-232; May on Insurance, (4th ed.), vol. 1, p. 5; Clark on Contracts, pp. 405–406; Lawson on Contracts, secs. 284–287; Hollingsworth on Contracts, pp. 229–232; Anson on Contracts, (2nd Am. ed.); pp. 232–233; Angell on Fire & Life Insurance, pp. 12, 14; Joyce on Insurance, vol. 1, secs. 2, 7; Emerigon, Meredith's Transl., p. 13; Richards on Insurance, § 20.

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subject of insurance, particularly in connection with vessels engaged and commodities used in interstate commerce;[1] but that consideration cannot draw to Congress a subject not delegated to it by the Constitution.

This feature of insurance, also, presents quite a striking example of the force of the suggestion heretofore made as to the difference in the nature of the power to regulate interstate commerce and foreign commerce. No one would challenge the power of Congress, by treaty or otherwise, to enact that foreign insurance companies should not be permitted to enter the United States by their agents or to send insurance policies for delivery there. Yet, if *Paul* v. *Virginia* and *Hooper* v. *California* and *New York Life Ins. Co.* v. *Cravens* are sound law and are not to be now overruled, Congress would have no power whatever to regulate the business of interstate insurance.

So, too, can it be doubted that Congress could by treaty provide that foreign insurance companies and underwriters might enter the territory of the United States and make contracts of insurance? That would clearly be within the power of Congress to regulate foreign relations, although no power exists to give domestic insurance companies such rights among the respective states.

V.

Let us suppose, as a test, that Congress should expressly authorize the circulation of Louisiana lottery tickets among the respective states. We are not now, of course, contemplating an attempt of the federal government to raise revenue or war funds by a lottery, which would present entirely different questions. The only theory upon which the power of Congress to act at

[1] *Hooper* v. *California*, 155 U. S. 648.

all in the case of state lotteries could be sustained would be under the commerce clause. Is it conceivable that this court would hold that such an enactment by Congress was a regulation of commerce before which the police laws of the states must fall, and that Congress could thus compel the respective states to permit traffic in lottery tickets authorized by another state or states? The conclusive answer would be that that was a matter within the police power reserved to the states and that it was never intended that any such power, express or implied, should be delegated to Congress by the grant of the power to regulate commerce.

We may also suppose, for example, that the Connecticut legislature desired, in the year 1796, to authorize a lottery, as it did in 1733, in order to raise funds for a new building for Yale College, and that the New York legislature desired to aid this purpose and authorized the sale of such lottery tickets.[1] Would an act of Congress prohibiting the carriage or transfer of such lottery matter from state to state other than by the mails have been a valid exercise of the power to regulate commerce? Indeed, in 1806, the legislature of Massachusetts authorized the raising of funds by a lottery for Harvard College so as to build Holworthy Hall and repair Massachusetts Hall. Could Congress have interfered with the transfer of these tickets to other states for the purposes of sale or have compelled the states to permit their sale?

But, what is, perhaps, more interesting, let us consider the question in connection with public revenue. The Continental Congress raised money for the army by means of a lottery[2] and Congress itself, under the Constitution,

[1] Spofford, Annual Report American Historical Association, 1892, pp. 171–195; Conn. stats. 1, 1736, p. 284; 1 Kent & Redcliffe, Laws of New York, 1801.

[2] Spofford, *supra*.

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has authorized lotteries.[1] Clearly, in no reasonable meaning of the commerce clause could it have been said that this legislation constituted a regulation of commerce. If the nation were to-day laboring under some great reverse and vicissitude of fortune and Congress were compelled to raise war funds by lotteries, its power to prevent the states from interfering with this perhaps vital and necessary source of revenue would not be under the commerce clause. This point was not necessarily involved in *Cohens* v. *Virginia*, 6 Wheat. 264, and the power of Congress to compel the states to permit the sale of lottery tickets issued under federal authority was not adjudicated. A state may desire to aid a public purpose by means of a lottery, as Massachusetts raised funds by a lottery, in 1780, for clothing the Massachusetts part of the Continental army.[2] Could Congress compel the other states to permit the sale of Massachusetts lottery tickets under the power to regulate commerce. Assuredly not.

Now, a state could prevent the sale of lottery tickets issued by or under the authority of other states, but could it prevent the sale of lottery tickets issued under federal authority if their sale within the respective states had been expressly authorized by Congress? It is submitted that it could not do so any more than it could prevent the sale of federal bonds or stocks, or tax them. This would not be because of the commerce clause, but under other powers of the supreme federal sovereignty. Yet it is submitted that a state could probably prohibit the sale of bonds or stocks of other states, and certainly could freely tax them.

[1] Act of May 4, 1812, c. 75 § 6, 2 Stat. 721, 726; act of May 6, 1812, c. 76, § 1, 2 Stat. 728; act of February 22, 1827, c. 14, 4 Stat., 205.

[2] Laws of 1780, c. 15; General Laws Massachusetts, 1780–1822, p. 42.

The analysis need not be pursued further. These examples must be sufficient to point the argument and to show the force of the contention that the court should not hold this lottery legislation to be within the power of Congress to regulate commerce.

VI.

In considering these ever-interesting and important questions as to the extent and limits of the power of Congress to create and punish crimes, it is always necessary to bear distinctly in mind that the framers of the Federal Constitution saw fit to withhold and deliberately "reserved to the states respectively" many objects which would have been appropriate for federal legislative action. In the light of the practical experience of our own times, we must deplore the fact that unreasonable fear and jealousy of a centralized national government prevailed when the Constitution was adopted, and thwarted the foresight of broader-minded statesmen and philosophers who would have extended and not curtailed the powers of the national government they were about to found. But the general power to punish for crimes in connection with many matters of national interest was denied. The student of the history of that critical period cannot fail to be impressed with the conviction that a grant to the federal government of police powers, such as the regulation and prevention of lotteries, could not have been secured, and that the Constitution itself would not have been ratified if any attempt had been made to give greater scope to federal legislation. All must regret the unfounded fear and the unreasoning jealousy that withheld from the national government powers which to-day could be exercised with immense benefit to the people of

the whole country. It was then, and is now, most desirable that lotteries, divorces, frauds,[1] negotiable instruments, the manufacture of explosives and inflammable oils,[2] etc., should be regulated by the central government under uniform laws. Legislation upon these subjects would tend to simplify the administration of justice, to introduce certainty into our systems of law, to accommodate interstate intercourse, and to strengthen and solidify us as one people. But the power was not conferred; and conservatism has thus far restrained us from amending the fundamental law. Until it is amended, the courts must enforce the Constitution as it is and not as we might wish it had been framed.

If it was not intended in 1789 to confer upon Congress power to regulate lotteries because lotteries were not then commerce any more than other aleatory contracts, then the power does not exist, for the Constitution "neither changes with time, nor does it in theory bend to the force of circumstances."[3] It is today what it was when Hamilton and Madison and Marshall wrote and argued in its support. The surrounding circumstances have changed, modes of life and trade have changed, the manners and morals and thoughts and notions of the functions and end of government and ideals of civic duty and patriotism, all these have changed, but the Constitution remains as it was then. New conditions of society are evolving; systems of municipal law are being changed incessantly to meet novel and complicated conditions; but the fundamental principles of the Constitution are the same as they were when adopted. When new conditions arise, the

[1] *United States* v. *Fox*, 95 U. S. 670.

[2] *United States* v. *Dewitt*, 9 Wall. 41.

[3] See *Ex parte Milligan*, 4 Wall. 2, 120; *In re Debs, Petitioner*, 158 U. S. 564, 591.

inquiry is whether they are analogous in their nature to the conditions which existed at the time of the adoption of the Constitution; and, if so, whether they come reasonably within the scope of the general powers intended to be granted to Congress by the express provisions of the Constitution. We are not at liberty to give the provisions of the Constitution new meanings as applied to conditions such as lotteries which actually existed at the time it was adopted. If we could, then "there is no power which may not, by this mode of construction, be conferred on the general government and denied to the states."[1]

The question now presented must, therefore, be decided, not according to our views of morals or of what would or should be now expedient as a function or power of the federal government, but according to the views of the framers so far as we can gather those views and their intention from the language of the Constitution itself and the circumstances and conditions existing at the time it was framed and adopted.[2] If lotteries which then existed would not have been deemed commerce at that time, the fact that lotteries have now fallen into disrepute cannot turn them into commerce or bring them within the scope of that term.

It may, indeed, be conceded that it is now desirable to have a uniform law regulating or preventing lotteries, as it would be to have a uniform law regulating insurance and divorces and commercial frauds; but, however desirable or however necessary such a federal power may seem to be, if it was not intended to be conferred upon the Congress, it cannot be read into the Constitution by legislative declaration or by judicial legislation.

[1] Chief Justice Taney in the *Passenger Cases*, 7 How. 286, 478; see also *Ex parte William Wells*, 18 How. 307, 311.

[2] *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 558; *Knowlton* v. *Moore*, 178 U. S. 41, 95.

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As is well known, at the time of the adoption of the Constitution, the ideas of the people in the thirteen states with respect to lotteries were radically different from what they are in our own times. We think lotteries immoral and necessarily detrimental to the welfare of the community. Other nations, particularly the Latin peoples, think otherwise. Our fathers considered lotteries, if honestly conducted, not only not injurious but to be encouraged. Revenue for the support of the state governments, of colleges and churches and other public enterprises was at that time derived from lotteries, and Congress itself sanctioned lotteries. It cannot reasonably be conceived that it was the intention or understanding of the people of the respective states in adopting the Constitution to grant to the federal government the power to prevent the states from using lotteries as a source of state revenue, if they saw fit so to do. It cannot be doubted that if the present question had arisen in the days of Marshall, when the public opinion of the country was not as hostile to lotteries as it is today—an opinion which continued for more than half a century afterwards—and if the federal government had sought to prevent the people of any state from dealing as they saw fit in the lottery issues of other states, it would have been held that Congress had gone outside of the powers which had been conferred on it by the terms of the Constitution, and that the legislation was unconstitutional and void. If this be true, the present legislation is no more valid than it would have been if adopted a century ago. To repeat, the Constitution does not change.

An adjudication that Congress has no constitutional power to prohibit the carriage or transfer of what does not in its nature constitute commerce or relate to it, will in no way affect or limit the power of Congress to carry out effect-

ively the express grant of the function to regulate interstate commerce. If the suggestion be made that Congress would be deprived of the power to prohibit the carriage of diseased animals, of infectious commodities, and of obscene literature and pictures, the answer is that all these constitute primarily a part of legitimate commerce and that, having the power to regulate commerce in them, Congress may prohibit the carriage or transfer of such as will tend to injure the community. Congress was given the power to compel the states to admit articles of commerce, notwithstanding any laws or police regulations of the respective states to the contrary. In all reason, therefore, the power must be implied to say what classes of articles of commerce should or should not be compulsorily brought into a state, and thus to protect the people, for otherwise there could be no protection. Having power to compel, it can safeguard. It is sometimes said that diseased animals or infectious goods or obscene literature do not constitute legitimate articles of commerce, and that their transport may be prohibited on that ground, but this is an incorrect use of terms. If they do not constitute articles of commerce, where did Congress find the power to exclude or regulate them? They are inherently articles of commerce, but they are injurious and harmful articles of commerce, and, as such, Congress may say that it will protect the states against them by prohibiting interstate commerce in them. Whatever may be the definition of lexicographers of the term "regulate," the reasonable and only true interpretation of the Constitution is that when the power to regulate interstate commerce was granted to Congress, it included the power to determine what articles of commerce should or should not have the advantage of free and untrammeled transport or sale, not-

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withstanding the laws of any state. It would, however, be stretching the language to an extreme which, it is submitted, the court will not sanction, if it be urged that under the power to regulate commerce, Congress could prohibit the transfer or compel the free sale of documents which have no relation to commerce and which concern transactions that in their essence do not constitute commerce in any form or sense.

CONCLUSION.

The order should, therefore, be reversed and the court below directed to discharge the appellant.

Washington, February, 1901.

WILLIAM D. GUTHRIE,
Of counsel for appellant.

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No. 106 Q 2

Reply Brf. of Guthrie, M for Appellee

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# Supreme Court of the United States.

OCTOBER TERM, 1900.

NO. 106.

CHARLES F. CHAMPION,
*Appellant,*
*vs.*
JOHN C. AMES, United States Marshal.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF IN REPLY TO BRIEFS OF APPELLEE.

WILLIAM D. GUTHRIE,
*Of counsel for appellant.*

[17,474.]

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[17,474.]

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For the purposes of this case, it is to be assumed, as conceded by the United States on the oral argument, that the lottery tickets and advertisements in question (record, pp. 71–76) were printed in the United States and were not imported from abroad. It follows, therefore, that we are not concerned in the case at bar with any exercise of federal power in respect of imports or smuggled or contraband goods, but with an exercise by Congress of an assumed power (1) to prohibit the transfer from one state to another of any article, and (2) to determine conclusively what is or what is not an article of commerce within the true meaning of the Constitution of the United States.

I.

No decision of this court has held that Congress, under the commerce clause, could prohibit the transfer from one state to another of articles of commerce. Of

course, if the power exist, the wisdom of any particular measure or the motive which induced its passage could not be challenged in the courts. Such a power as is claimed by the Government in the case at bar would draw to Congress a range of legislative action beyond what has ever been seriously conceived to have been intended by those who framed the Constitution of the United States. The limits of the possible ramifications of such a power would, indeed, be difficult to imagine. Its scope would include every form and species of intercourse among the people of the United States, and would practically substitute for the limited power to regulate commerce, the unlimited power to regulate all intercourse, including public morals. So, also, a ruling that Congress may prohibit the transfer of any articles of commerce from state to state would be an expansion of the Constitution broader than anything yet intimated. Moreover, the power to enact absolute prohibition would mean the power of destruction; and surely "this power to regulate is not a power to destroy." [1]

The true rule would seem to be that if an article is in its nature an article of commerce Congress may regulate its transfer from state to state, and may say that after the transfer is completed such article shall or shall not become subject to the state's reserved police power. This is a fair incident of regulation. The Constitution does not say that commerce shall be absolutely free and untrammeled. But if the article in question is not an article of commerce, then the rule must be that Congress cannot under the commerce clause regulate it in any sense, for the simple reason, which must be self-evident, that if the article is not an article of commerce, the power

[1] Chief Justice Waite in the *Railroad Commission cases*, 116 U. S., 307, 331.

to regulate was not delegated, and, consequently, there is no jurisdiction in Congress.

It is, however, said that power must reside somewhere to prevent noxious articles from being introduced into a state. This is conceded. But it clearly resides in the states, and when exercised by the states, according to local policy and necessity, it has been found and is sufficient for all practical purposes.

A state may legislate against the bringing within its borders of any article which the legislature in its discretion considers deleterious, and the states actually do so in respect of many forms of intercourse. The power to exclude from the state noxious articles is absolute except when those articles are articles of commerce. If they are articles of commerce, and Congress has been silent upon the subject, they are presumably entitled to free entry, transportation and opportunity of sale. The police laws of the state cannot reach the article while it remains in its original package as an import and before it has been so separated as to become part of the general property of the state. In other words, while crossing the border, and until the sale in the original package, there must be freedom of sale if Congress has been silent, or if it has so ordained, or if it has not *regulated* in limitation of the right of sale.

But, Congress may, as to any article of commerce, ordain that as soon as it comes within the state, even in its original package, it may be subjected to the operation of the police laws of that state together with other similar property within the borders of the state. It may be suggested that this proposition involves the concession that Congress may thus indirectly prohibit interstate commerce in an article by permitting the states to inter-

fere with and interdict the sale. This conclusion by no means follows. In the first place, Congress, by saying that a certain recognized article of commerce may be subjected to the police laws of the state, does not attempt to prevent the transportation of that article from state to state, and does not attempt in the slightest degree to prohibit interstate commerce in it. There must be a vast difference between an act of Congress which should say that intoxicating liquors may be subjected to the police laws of a state after their transportation into a state, and an act of Congress which should prohibit the transfer of liquor from one state to another;—the one fully recognizes the reserved powers of the state, the other would absolutely interfere with the discretion and power of the states to permit or to prohibit. One state may desire to encourage what another must prohibit; in one locality a certain article, *e. g.* intoxicating liquors, may be deemed beneficial; in another, noxious. A study of the reasoning of the court in the case of *In re Rahrer*, 140 U. S. 545, will convince us that it was by no means the idea that the opinion was sanctioning the contention that Congress might prohibit all interstate traffic in liquors. As Mr. Chief-Justice Fuller said of the legislation then in question (at pp. 561 and 564): "In so doing, Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the states, or to grant a power not possessed by the states, or to adopt state laws. . . . It imparted no power to the states not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

As a broad question of statesmanship under a constitution intended to govern an empire—if we may employ

Hamilton's expression in the Federalist—it must be quite evident that the attempt by Congress to regulate by sumptuary laws, for example, the sale of liquor, and to prohibit interstate traffic therein, notwithstanding the wishes of the various states and local preferences, would be a departure which would cause much astonishment, whilst the exercise of the power discussed in *In re Rahrer* by no means involved any power which ought to be considered doubtful, or that any one could reasonably wish did not exist.

II.

In the case at bar, the principal, but not the sole or controlling, proposition of the appellant is that a lottery ticket or advertisement is not an article of commerce and that the protection of the people of the respective states from the evils of the lottery business should be left where it was the intention of the framers of the Constitution to leave it, namely, in the respective states, to permit, to regulate, or to prohibit. If the local laws be enforced, the states have ample power to regulate or prohibit the lottery business. If lottery tickets and advertisements are not articles of commerce, the states clearly have the fullest power to prevent any railroad or express company or other carrier or any person from carrying or transferring such matter within their respective borders.

Congress cannot conclusively determine what is or what is not an article of commerce. That inquiry is essentially a judicial question. Otherwise, Congress could determine for itself the extent and limits of its own powers. A legislative fiat cannot make that commerce or a commercial commodity which in its essence and nature is not such. A transaction which in its nature or analysis

is not commercial, cannot become so merely because Congress declares it commerce. Congress could not, for example, declare insurance to be commerce and compel the states to permit insurance companies to transact business within their borders on the ground that such companies were engaged in interstate commerce. Nor could Congress, under the guise of regulating interstate commerce, compel the states to permit the sale of Louisiana or other lottery tickets, and thus strike down all state laws prohibiting the sale of such tickets. A lottery agent indicted in New York under a statute of that state for selling Louisiana lottery tickets could not invoke the protection of the commerce clause. Would not such a contention be simply preposterous?

The argument of the United States fails to establish any essential difference in principle between an insurance contract or policy and a lottery contract or ticket. If, in three well considered cases,[1] this court has felt constrained to hold that insurance was not commerce and an insurance contract not a commercial transaction *within the true meaning of the Constitution*, then it must logically follow *a fortiori* that lottery tickets, which are but another form of aleatory contracts, and relate in no sense even remotely to commodities, are not commercial transactions. A reference to those cases will show that the analysis contained in the appellee's supplemental brief is not accurate. The court appreciated in *Hooper* v. *California*, 155 U. S. 648, 653, that it would be most desirable and expedient to hold that the interstate insurance business, and particularly marine insurance,

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[1] *Paul* v. *Virginia*, 8 Wall. 168, 183; *Hooper* v. *California*, 155 U. S. 648, 653, 655; *New York Life Insurance Co.* v. *Cravens*, 178 U. S. 389, 401; reviewed again at this term in *Williams* v. *Fears*, 179 U. S. 270, 277.

should be free as part of commerce, but the court could not consistently adopt that view without disregarding the limitations of the Constitution. In that case, on the one side, it was insisted on behalf of Hooper that marine insurance was necessarily a commercial transaction, constituting a part of foreign and interstate commerce, and, on the other side, it was insisted on behalf of the state of California that insurance was not commerce. The briefs on file in the *Hooper* case show this fact conclusively. The question was thus distinctly presented, and the court, as above stated, felt constrained to hold that the commerce clause did not apply, although insurance is obviously an incident of commercial intercourse, as is also an immigrant agency.[1] Significant, too, is it that in the dissenting opinion of Mr. Justice Harlan in the *Hooper* case, there is not the slightest suggestion that insurance did constitute commerce. The dissent was placed on an entirely different ground.

The analogy between the business of insurance and lottery as understood and classed at the time of the adoption of the Constitution is most strikingly confirmed by the extract from Mr. Jefferson's writings submitted in the brief of the Government at p. 77, in which Jefferson is quoted as saying:

> "There are some other games of chance useful on certain occasions and injurious only when carried beyond their useful bounds. Such are insurances, lotteries, raffles, etc. These they do not suppress, but take their regulation under their own discretion. The insurance of ships on voyages is a vocation of chance, yet useful, and the right to exercise it, therefore, is left free. So of houses against fire, doubtful debts, the continuance of a particular life, and similar cases."

The argument that lottery tickets are commodities

[1] *Williams* v. *Fears*, 179 U. S. 270, 273.

because they pass by delivery is not sound, nor does it advance us in the solution of this very broad and important constitutional point. This case must be decided on far broader considerations than this narrow and superficial feature of delivery. Insurance policies on goods in transit usually are not personal, but run in favor of the owner of the property, and the title to that property passes by delivery of the bill of lading or warehouse receipt. The fact that an insurance policy or ticket as it is sometimes called passes by delivery with the delivery of the bill of lading does not render it commerce within the Constitution. Most lottery tickets are now, it is true, payable to bearer and pass by delivery; and because of this fact the Government urges that the decision be placed upon the ground that the ticket may be treated as a commodity. But this contention involves the implication that such transactions would change their essential nature if the mode of doing business were altered and lottery tickets or slips were no longer made transferable by delivery but were confined to the individual first purchasing, with whom a personal contract was made! Such a ground would be entirely too narrow, and, moreover, would be very easily circumvented. It would not reach what of all things is most important, namely, the lottery circulars and advertisements. It would be simple and easy to print within a state the tickets or contracts or slips, or merely record the numbers (as is done on the race track) and then transfer from state to state simply the advertisements and circulars and the notices of drawings (*France* v. *United States*, 164 U. S. 676, 682).

III.

It is, however, contended by the appellee that Congress

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may regulate express companies and other interstate carriers as instrumentalities of commerce, and that this involves the power to determine what they shall and what they shall not transport; in other words, that Congress has exactly the same power over these instrumentalities of commerce that it has over the United States mails. Under this contention, it would follow that Congress could prohibit the transfer from state to state of any class of commodities, of insurance policies, of municipal bonds, of notes, and of everything in fact that is used in interstate intercourse among the people of the respective states. It is submitted that the power to regulate commerce does not authorize Congress to say what shall or shall not be carried from state to state, especially without regard to the commercial character of the matter carried.

Besides, the indictment in the case at bar is not against a carrier; the act is not aimed at carriers; there was no intention to restrain or punish carriers as such; the defendant Champion is not a carrier. When an act of Congress shall be framed expressly applicable to carriers, it will be time enough to consider and determine whether or not Congress can say *quoad* the carrier what he shall or shall not transport and punish him criminally for disobedience. The present case does not present any such question, and at best, if we are to plead to the indictment and the statute, the offense charged is an attempt to cause the express company to do an act for which the express company itself would not be punishable and which act *quoad* the express company is not prohibited by the statute. The statute was drawn so as not to affect or punish the carrier, and perhaps designedly so.

IV.

The Government also suggests that even if lottery tick-

ets and advertisements are not to be treated as commercial commodities and the power to regulate commerce fall short of the power to prohibit and determine what carriers should or should not transport, Congress could, nevertheless, in order to protect what was called "legitimate commerce," regulate, as it were, the morals of all the people of the United States engaged in interstate intercourse and interstate commercial transactions. However desirable such a power might be, it was clearly not delegated to Congress. Exactly the same argument was urged upon this court in the case of *United States* v. *Fox*, 95 U. S. 670, 672, in support of the fraud clause of the bankruptcy legislation of 1867 (Rev. Stat. § 5132, p. 990), but this court said:

> "An act committed within a state, whether for a good or a bad purpose, or whether with an honest or a criminal intent, cannot be made an offence against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States. An act not having any such relation is one in respect to which the state can alone legislate."

V.

It also seems to be urged that, even if the legislation in certain aspects be unconstitutional, the court may uphold the act by limiting it to lottery tickets without regard to the provision as to advertisements on the ground that lottery tickets are commercial commodities, or uphold the act by limiting it to express companies or other carriers engaged in interstate commerce on the ground that they are instrumentalities of commerce. It must be patent that Congress did not intend to limit the act or its scope in either of these particulars. Is the court, for the purpose of making a portion of the act valid, to imply limitations which Congress omitted — and presumably with design? Such a form of judicial con-

struction would be nothing less than judicial legislation; it would be making the law and not declaring it; it would be amending the law and not construing it; it would be doing an act not within the province of the judiciary. Besides, the precedents are entirely against any such form of construction.

In *United States* v. *Reese et al.*, 92 U. S. 214, 221, an act of Congress, passed May 31, 1870 (16 Stat., 140), provided for the punishment of election officers who should refuse to any person lawfully entitled to do so the right to cast his vote at an election. The court was of opinion that Congress had constitutional power to punish such denial only when it was on account of race, color or previous condition of servitude. It was urged that the general description of the offense included the more limited one, and that the section was valid where such was, in fact, the cause of denial. But the court said through Mr. Chief Justice Waite:

> "We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. . . . *To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty.*"

In the *Trade-Mark Cases*, 100 U. S. 82, 98, 99, an act of Congress provided for the registration of trade-marks generally without limiting their use to commerce

between the states or with foreign countries. The defendants were indicted for violating the provisions of this act. It was suggested that if Congress had power to regulate trade-marks used in commerce with foreign nations and among the several states, the statute should be held valid in that class of cases, if no further. The court (Miller, J.) said:

> "While it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body" (p. 98). . . . "*If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do; namely, make a trade-mark law which is only partial in its operation,* and which would complicate the rights which parties would hold, in some instances under the act of Congress, and in others under state law." (p. 99).

The act was, therefore, held to be wholly unconstitutional.

In *Poindexter* v. *Greenhow*, 114 U. S. 270, 304, certain bonds of the state of Virginia had been issued under an act providing that the coupons thereon should be receivable at and after maturity for all taxes due the state. Thereafter the legislature passed an act requiring tax collectors to receive in discharge of taxes gold, silver, treasury notes, national bank currency and nothing else, and forbidding the receipt of coupons issued under the foregoing act in payment therefor.

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The latter act also abolished the actions of trespass and trespass on the case, and other particular forms of action as remedies for the taxpayer who had tendered his coupons in payment of taxes. The court held that the provisions of the act providing that the coupons should be receivable in payment of taxes constituted a contract, and that the act providing that they should not be so receivable was unconstitutional as it impaired the obligation of that contract. It held also that those parts of the latter act abolishing the remedies of the taxpayer were not separable from the remainder of the act, inasmuch as they all constituted part of one plan, and that the entire act was, therefore, unconstitutional. Matthews, J., said:

> "It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see, and to declare, that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part should fail. *To hold otherwise would be to substitute for the law intended by the legislature one they may never have been willing by itself to enact.*"

In *Spraigue* v. *Thompson*, 118 U. S. 90, 95, a statute of Georgia provided that any master of a vessel bearing toward any of the ports of the state, except coasters in the state, and between the ports of the state and those of South Carolina or of Florida, who refused to receive a pilot on board, should be liable, on his arrival in such port of the state, to pay the first pilot who might have offered his services outside the bar the full rates of pilotage established by law. It was held that this provision was unlawful by reason of the fact that it discriminated in rates between the ports of different states.

It was urged that the illegal exceptions might be disregarded so that the rest of the section could stand, upon the principle that a separable part which is unconstitutional, may be rejected, and the remainder of the statute preserved and enforced. The court said (Matthews, J.):

> "The insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the legislature of Georgia the statute is made to enact what confessedly the legislature never meant. *It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions.*"

In *Baldwin* v. *Franks*, 120 U. S. 678, 685, an act of Congress provided for the punishment of those who in any state or territory conspired for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges or immunities under the laws. It had previously been held that this statute was unconstitutional in so far as it applied to conspiracies to deprive persons of the equal protection of the laws of the state, no special rights or privileges arising under the constitution, laws or treaties of the United States being involved. It was contended that, while this was the fact, still the statute was effectual so far as concerned conspiracies to deprive aliens of the rights guaranteed to them in a state by the treaties of the United States. The court said (Waite, C. J.):

> "In support of this argument reliance is had on the well-settled rule that a statute may be in part constitutional and in part unconstitutional, and that under some circumstances the part which is constitutional will be enforced, and only that which is unconstitutional rejected. To give effect to this rule, however, the parts—that which is constitutional and that which is unconstitutional—must be capable of

separation, so that each may be read by itself. This statute, considered as a statute punishing conspiracies in a state, is not of that character, for in that connection it has no parts within the meaning of the rule. . . . It provides in general terms for the punishment of all who conspire for the purpose of depriving any person, or any class of persons, of the equal protection of the laws, or of equal privileges or immunities under the laws. A single provision, which makes up the whole section, embraces those who conspire against citizens as well as those who conspire against aliens—those who conspire to deprive one of his rights under the laws of a state, and those who conspire to deprive him of his rights under the Constitution, laws, or treaties of the United States. The limitation which is sought must be made, if at all, by construction, not by separation. This, it has often been decided, is not enough."

The subject was again reviewed by Mr. Chief Justice Fuller in *Pollock* v. *Farmers Loan & Trust Co.*, 158 U. S. 601, 635, 636, where the above cases of *Poindexter* v. *Greenhow* and *Spraigue* v. *Thompson* were particularly cited with approval.

CONCLUSION.

For these reasons and those suggested in the briefs already filed, it is submitted that this interstate commerce feature or portion of the act of Congress of March 2, 1895,[1] should be declared to be an exercise of power not delegated to Congress by the Constitution and consequently invalid, and that the regulation of public morals in respect of lotteries must be held to remain, as it has ever been, within the local jurisdiction of the respective states.

Washington, March 5, 1901.

WILLIAM D. GUTHRIE,

Of counsel for appellant.

[1]The several features of the act were passed at different times. Thus, the feature as to the United States mails was enacted in 1890 (26 Stat. 465); the feature as to imports from abroad, in 1894 (28 Stat. 549), and the feature as to transfers from state to state, in 1895 (28 Stat. 963).

No. 9 & 2

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Supreme Court of the United States,

Brf. of Guthrie for Appt.

OCTOBER TERM, 1901.

NOS. 9 AND 293.

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Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

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WILLIAM D. GUTHRIE,
*Of counsel for appellant Champion.*

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### STATEMENT.

The case of *Champion* v. *Ames*, above entitled, was argued at the last term of this court, being then No. 106 upon the calendar, but a reargument was directed to be heard at the present term at the same time as the

hearing in *Francis* v. *United States*. The two cases present substantially the same question as to the power of Congress to prohibit the carriage of lottery tickets from one state to another. It is, therefore, believed that the brief on behalf of Champion may properly and conveniently be entitled in both cases, particularly as the court ordered the cases to be heard together and as they alike involve the constitutionality of the act of Congress of March 2, 1895 (c. 191, § 1; 28 Stat. 963), generally known as the federal anti-lottery act. The statute is entitled "An Act for the suppression of lottery traffic through national and interstate commerce and the postal service subject to the jurisdiction and laws of the United States," and section 1 reads as follows:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, that any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, or deposited in or carried by the mails of the United States, or carried from one State to another in the United States, any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, to be brought into the United States, or deposited in or carried by the mails of the United States, or transferred from one State to another in the same, shall be punishable in the first offense by imprisonment for not more than two years or by a fine of not more than one thousand dollars, or both, and in the second and after offenses by such imprisonment only."

The act of Congress contains three separate features of anti-lottery legislation, which were enacted at different times, namely, (1) as to importations from abroad, (2) as to the use of the United States mails, and (3) as to carriage or transfer from one state to another by any means other than the mails. Congress legislated for the first time in 1868 on the subject of suppressing lotteries, and the legislation then and for many years was confined to excluding lottery matter from the United States mails (act of July 27, 1868, 15 Stat. 196; act of June 8, 1872, 17 Stat. 302; act of July 12, 1876, 19 Stat. 90; Rev. Stat. § 3894; act of September 19, 1890; 26 Stat. 465). In 1894 the act was amended so as to prohibit the importation of lottery matter from abroad (act of August 27, 1894; 28 Stat. 509, 549). In 1895 the act was again amended so as to prohibit the carriage of lottery tickets and the transfer of lottery advertisements from one state to another by any means or method (act of March 2, 1895; 28 Stat. 963).

In the *Champion* case, the offense charged in each count of the indictment is the act of delivering in the State of Texas to the Wells-Fargo Express, a carrier, a box containing papers, certificates or instruments purporting to be or represent tickets, chances, shares or interests dependent upon the event of a lottery, etc., for transportation to Fresno, California (record in No. 9, pp. 8–13). The offense charged in the *Francis* case is a conspiracy to cause to be carried from Newport, in the State of Kentucky, to Cincinnati, in the State of Ohio, papers representing what are known as "policy" slips or tickets (record in No. 293, p. 2). Both cases are con-

fined to the offense of causing lottery tickets or policy slips to be carried from one state to another, and neither case involves any question as to the transfer of lottery advertisements. Although, in the *Champion* case, the lottery tickets purport to be issued by the Pan-American Lottery Company, of Asuncion, in the Republic of Paraguay, the tickets are printed in English, and there is no suggestion in the indictment, evidence or argument that they were "brought within the United States from abroad." Indeed, for the purposes of the prior argument, the government conceded that it might be assumed that the lottery tickets in question were printed in the United States and were not imported from abroad. The *Francis* case, however, presents no element of international commerce or foreign relations or importations from foreign countries. Both cases arise under the third clause mentioned above, covered by the amendment of 1895, which prohibits the causing of lottery tickets to be carried from one state to another by means other than the mails.

The nature of lotteries needs no description. The method of conducting the game of policy involved in the *Francis* case, as shown by the evidence, may, however, be briefly described (106 Fed. Rep. 899). It differs somewhat from the policy game described by Mr. Justice Peckham in *France* v. *United States*, 164 U. S. 676, 678. In the *Francis* case at bar, it was shown that the principal office of the "policy" concern was located in Cincinnati, Ohio; that the drawings took place in an adjoining building or room, and that sub-offices or agencies were maintained in various places in that city and in other cities in Ohio and other states, at which patrons

or players would select numbers in the drawings to be made in Cincinnati. One desiring to play such a game chooses three of the numbers from 1 to 78 inclusive, and writes them upon a slip of paper, of which he keeps a duplicate. He hands his list of numbers, with figures to denote the sum paid together with the money to pay for his chance, to the person in charge of the sub-office or agency to be transmitted to the principal office in Cincinnati. When these slips and the moneys are brought to the principal office, the drawing takes place. Successive numbers from 1 to 78 inclusive are put into a wheel, and at each drawing twelve numbers are taken out. If the three numbers on the slip are of the twelve drawn from the wheel, the purchaser wins a prize. If not, he loses. A report of the drawings is sent back to the agency from which the slip came, and, if any purchaser has won a prize or, as it is termed, made a "hit," his slip is returned with the prize to be there delivered to him. In the instance shown by the testimony, the selection was made by the witness Harrison at the Newport office. Of the defendants, Reilley was claimed to be in charge of the principal office in Cincinnati, Francis in charge of the drawings, and Hoff in charge of the station in Newport. Edgar carried the slips from Newport to Cincinnati, and this carriage of the slips constituted the alleged overt act done in pursuance of a conspiracy in violation of the act of Congress.

The only branch of this federal anti-lottery legislation which has heretofore come before this court for adjudication is that relating to the exclusion of lottery matter from the mails. The act of Congress was then sustained

upon the ground that plenary and exclusive power had been vested in Congress by the Constitution to establish post-offices and post-roads and to control as it saw fit the entire postal system of the country. This point was settled by the decisions of the court in *Ex parte Jackson*, 96 U. S. 727, 732, and *In re Rapier*, 143 U. S. 110, 133. Although the power of Congress to forbid the carriage or transfer of lottery tickets or advertisements from one state to another by means other than the mails has not yet been decided by this court, nevertheless in *Ex parte Jackson*, *supra* (96 U. S. 727, 735), Mr. Justice Field, delivering the unanimous opinion of the court, said:

> "But we do not think that Congress possesses the power to prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails. To give efficiency to its regulations and prevent rival postal systems, it may, perhaps, prohibit the carriage by others for hire, over postal routes, of articles which legitimately constitute mail matter, in the sense in which those terms were used when the Constitution was adopted, consisting of letters, and of newspapers and pamphlets, when not sent as merchandise; *but further than this its power of prohibition cannot extend.*"

And in the subsequent case of *In re Rapier*, 143 U. S. 110, 133, Mr. Chief Justice Fuller stated that the *Jackson* case had held "that the transportation in any other way of matters excluded from the mails would not be forbidden." The point was presented to the court in *France* v. *United States*, 164 U. S. 676, 683, but was not decided.

The power of Congress to exclude importations of lot-

tery matter from abroad and the power to prohibit the carriage and transfer of lottery tickets and advertisements from one state to another have, therefore, not yet been determined or upheld by the court. The cases now at bar distinctly present the latter question, as to whether or not Congress may prohibit the carriage of lottery tickets from one state to another by any means other than the United States mails. The appellants contend that lotteries and dealings in lottery tickets or policy slips are not commerce within the true meaning of that term as used in the Constitution of the United States; that the prohibition and suppression of lotteries is a subject exclusively within the scope of the police power reserved to the states, and that it is for each state to regulate, to permit or to prohibit lotteries as the local policy may dictate. The Government contends, on the other hand, that lotteries constitute a branch of interstate commerce, and that the power to regulate commerce includes the power to prohibit and suppress interstate intercourse in respect of lotteries, or, to use the language of the government's brief, "to legislate lotteries out of existence" (p. 7).

A suggestion was made on the prior argument that the state laws had been found to be ineffective for the suppression of lotteries, and that this court should, therefore, strain to sustain any federal legislation which was necessary or expedient to cope with the assumed evil. This is a suggestion which, even if true, should not be pressed. It is confidently submitted that present expediency or public necessity cannot expand the commerce clause or change its original scope and meaning. If the suppression of lotteries was exclusively within the pro-

vince of the police power of the states according to the true interpretation of the Constitution, as understood at the time it was adopted, no present expediency or necessity can justify extending the commerce clause to cover it. Moreover, as matter of fact, every act charged in these indictments is covered by adequate legislation in Texas, California and Illinois in the one case[1] and Kentucky and Ohio in the other case.[2] Champion could have been indicted in Texas or California for the overt act charged in the indictment in his case, and Francis *et al.* could have been indicted under the laws of Kentucky or Ohio. If the local laws be enforced, the states have ample power to prohibit and suppress lotteries. Besides, any suggestion that the local lottery laws may not be enforced in some states or that the officers charged with enforcing them may be derelict or corrupt, even if true, affords absolutely no legitimate argument in support of federal legislation. If such an argument could be listened to, it would, in its last analysis, vest in Congress power to legislate in all criminal matters whenever the state laws were not duly enforced, as to any acts or transactions arising from or connected directly or indirectly with intercourse among the inhabitants of the several states.

## I.

Although the clause of the federal anti-lottery act which prohibits importations of lottery tickets and ad-

[1] See Rev. Stats., Texas, 1895, Arts. 373-378; Penal Code, California, 1899, §§ 319-326; Rev. Stats., Illinois, Myers, 1895, §§ 180-185, p. 481.

[2] See Gen. Stats., Kentucky, 1899, §§ 1314-1317, 2573-2580; Bates Ann. Stats., Ohio, Third ed., §§ 6929-6931.

vertisements from abroad is not now presented for adjudication, nevertheless a discussion of the power of Congress over foreign relations and imports will be pertinent in juxtaposition to the power over interstate commerce. The idea that the power to prohibit importations of lottery matter from abroad would be necessarily denied if the interstate feature of the federal anti-lottery legislation now in question were not upheld, seems to have unduly impressed or influenced the court below in the *Francis* case, if, indeed, the idea did not mislead it (record in No. 293, p. 365; 106 Fed. Rep. p. 903).

The whole power to regulate every form of relations and intercourse with foreign countries resides in the sovereign national power created by the Constitution of the United States;[1] and every manner of intercourse in its broadest signification, whether commercial intercourse or otherwise, is to be regulated, permitted or prohibited by Congress alone.

The source and scope of this power to regulate international commerce are, in their very nature, essentially different from the source and scope of the power to regulate domestic commerce. In the case of international commerce, there is no limitation whatever upon the power of Congress and no implied or reserved power in the states. In the case of internal or interstate commerce, the only power Congress exercises is that expressly delegated by the states, and that power is hedged in and circumscribed by the local police and municipal powers expressly reserved to the states.

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[1] *Head Money Cases*, 112 U. S., 580, 591.

When regulating commerce or intercourse with foreign nations, the extent of the power delegated to the federal government is as unlimited as that of any other sovereignty. It rests not merely on the commerce clause, but likewise on the power to lay duties and imposts, to make treaties, to provide for the common defense, to wage war, etc. But when considering a statute regulating internal or interstate commerce, the exercise of power in the given case is limited to that expressly granted and must not trench upon "the powers not delegated to the United States by the Constitution," but by that instrument expressly "reserved to the states respectively, or to the people"[1]—considerations and limitations which have no weight in regulating foreign affairs.[2] In regulating what is generally termed international commerce and intercourse, Congress must, of necessity, have ample power to prevent the introduction of foreign lottery matter, and, in order to render such inhibition effective, it must have power to prohibit the possession of such matter or its transfer from one state to another just as fully as it may prohibit the possession or carriage or transfer of smuggled imports or contraband goods even from point to point within a state. But many of the considerations which are of a national character and which arise between the United States, as a nation, and foreign nations wholly disappear when interstate relations are contemplated.

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[1] Tenth Article of Amendment to the Constitution of the United States.

[2] Indeed, Madison placed the power to regulate intercourse with foreign nations in a class distinct and separate from the power to regulate interstate commerce. The Federalist; Hamilton's Works, Lodge's ed., vol. 9, pp. 250, 258, 262.

Thus, Mr. Justice McLean, in his concurring opinion, in *Groves et al.* v. *Slaughter*, 15 Peters 449, 505, said:

> "Under the power to regulate foreign commerce Congress impose duties on importations, give drawbacks, pass embargo and non-intercourse laws, and make all other regulations necessary to navigation, to the safety of passengers, and the protection of property. Here is an ample range, extending to the remotest seas where the commercial enterprise of our citizens shall go, for the exercise of this power.
>
> The power to regulate commerce among the several states is given in the same section, and in the same language. But it does not follow that the power may be exercised to the same extent. . . .
>
> The United States are considered as a unit, in all regulations of foreign commerce. But this cannot be the case where the regulations are to operate among the several states. The law must be equal and general in its provisions. Congress cannot pass a non-intercourse law, as among the several states; nor impose an embargo that shall affect only a part of them."

It may, therefore, be conceded that Congress, under the plenary power to regulate our relations with foreign countries, may well exclude persons, commodities or printed matter of any nature whatsoever, whether or not relating to or connected with commerce. The power of Congress—the legislative power of a sovereign nation—to exclude foreign persons or commodities or printed matter in its judgment and discretion need not be challenged in the slightest degree. When we say that Congress may exclude or deport foreigners or their products or publications from the United States, or pass a non-intercourse law, or place an embargo upon

foreign ships or manufactures,[1] we are but recognizing the ancient doctrine of international law that an alien or an alien's property comes into the territory of a sovereign nation only by its sufferance, and may be excluded at its will. And whether the exclusion be for the purpose of self-defense, or as an incident to the regulation of imports or commerce, or otherwise, the right to exclude or deport or prohibit is as much a part of the sovereign's prerogative as is the right to make treaties giving to foreigners the privilege of abiding or of bringing or selling their goods or publications within the sovereign's domain. That this attribute of sovereignty under the treaty power has been surrendered by and does not belong to the states cannot for a moment be doubted, for the states are expressly forbidden to enter into any form of treaty.[2]

The power to regulate commerce among the several states, it is true, is given in the same section and in the same language as the power to regulate foreign or international commerce, but it by no means follows that the scope of the power is the same in both cases or that it may be exercised to the same extent.[3] The same terms in relation to separate subjects may, of course, differ in scope and signification.

II.

The point in this case, as to the power of Congress to prohibit the carriage or transfer of lottery matter

[1] *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 659; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 707; *United States* v. *Brigantine "William,"* 2 Hall's Am. Law Journal, 255; *Gibbons* v. *Ogden*, 9 Wheaton, 1, 191, 192.

[2] Section 10 of Article I. of the Constitution of the United States.

[3] *Groves et al.* v. *Slaughter*, 15 Peters, 449, 505.

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from one state to another must, therefore, be discussed and determined as a question of interstate commerce pure and simple, separated from those considerations which relate only to importations from abroad, and which are not common to international and interstate relations.

The appellants contend that a lottery ticket or advertisement is not an article of commerce, that the conduct of lotteries and the sale of lottery or policy tickets is not commerce; that the protection of the people of the respective states from the evils of lotteries should be left where it was the intention of the framers of the Constitution to leave all such police regulations, namely, in the respective states, to regulate, to permit, or to prohibit, and that the power to regulate commerce never was intended to authorize Congress to say what shall or shall not be carried from state to state, without regard to the commercial character of the matter carried. Indeed, if the given subject be not commerce, where does Congress derive any power to regulate it?

In so far as the law now under consideration is aimed against the lottery ticket or policy slip, either at the place where the paper started or delivery was made, or at the place where the paper will find itself, or where the contract may take effect at the end of its journey, it is an attempt to interfere with the local police regulations of either place. Lotteries, wherever found, are not interstate commerce, but at most interstate wagering, such as insurance and other forms of speculation or gambling. It is true that lotteries, which were once extensively engaged in, have gradually fallen into disrepute and become

illegitimate, and that the states, in the exercise of their police powers, have one by one prohibited them, and in aid of this prohibition have passed laws forbidding the introduction of advertisements and papers from other states. But the gradual condemnation of lotteries did not make them interstate commerce if it was not so before, or diminish the power of the respective states to permit, regulate or prohibit them. If the change had any effect, it must have been the reverse.

This court has frequently decided that the police power of the states was not surrendered when the Constitution conferred upon Congress the general power to regulate commerce with foreign nations and among the several states[1]; and it has also decided that lotteries are proper subjects for the exercise of this state police power, and that grants of lottery privileges are not within the protection of the contract clause.[2] The commerce clause in the past, when lotteries were generally favored, was never invoked to protect from state legislation or prohibition persons dealing in lottery tickets or policy slips. There are innumerable forms of gambling and speculation current among the people of the respective states, and although these may constitute interstate gambling or crimes committed partly in one state and partly in another, they constitute, in no proper sense of the term, any form of interstate commerce and as such within the jurisdiction of Congress.

It may be admitted that, if *commerce* means

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[1] Mr. Justice Harlan in *Patterson* v. *Kentucky*, 97 U. S. 501, 503, 505.

[2] *Stone* v. *Mississippi*, 101 U. S. 814, 818; *Douglas* v. *Kentucky*, 168 U. S. 488, 496.

*intercourse* in the broadest sense of that term, then the legislation in question is within the power delegated to Congress.[1] But if the word *commerce* was not intended to include all the significations and range of the word *intercourse*, then it will be assumed that no argument would be patiently listened to which sought to urge upon this court the proposition that it is within the judicial province to interpolate or substitute in place of *commerce* the word *intercourse*, which the framers of the Constitution, in their wisdom, saw fit not to use or insert. The word *intercourse*, in one of its significations or aspects, may well briefly describe commerce; yet, obviously, all intercourse is not commerce. Nor is there any warrant for the contention that Chief Justice Marshall, in *Gibbons* v. *Ogden*, 9 Wheat., 1, 189, or this court in later cases, defined the word *commerce* as embracing all the meanings of the word *intercourse*. What has been ruled is, not that *commerce* is the equivalent or synonym of *intercourse*, but that commerce is synonymous with "*commercial* intercourse," which no one could dispute. As Chief Justice Marshall said in that famous case (p. 189):

> "The subject to be regulated is commerce; and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that

[1] See remarks of Chief Justice Taney in note to *Passenger Cases*, 7 How. at p. 492.

it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the *commercial* intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on *that* intercourse."

In considering these important questions as to the extent and limits of the power of Congress to create and punish crimes, it is always necessary to bear distinctly in mind that the people of the United States, when adopting the Federal Constitution, saw fit to withhold and deliberately "reserved to the states respectively or to the people" many objects which would have been appropriate for federal legislative action. The practical experience of our own times may lead us to deplore the fact that unreasonable fear and jealousy of a centralized national government prevailed when the Constitution was adopted, and thwarted the foresight of broader-minded statesmen and philosophers who would have extended and not curtailed the powers of the national government. But the general power to punish for crimes in connection with many matters which were or might become of national interest was intentionally withheld. The student of the history of that critical period cannot fail to be impressed with the conviction that a grant to the federal government of police powers, such as the regulation and suppression of lotteries, could not have been secured, and that the Constitution itself would not have been ratified if any attempt had been made to give greater scope to federal legislation. All must regret the unfounded fear and the

unreasoning jealousy which withheld from the national government powers that to-day could be exercised with immense benefit to the people of the whole country. It was then, and may now be, most desirable that lotteries, insurance, frauds,[1] negotiable instruments, divorces, the manufacture of explosives and inflammable oils,[2] the inspection of slaughtering and packing,[3] etc., should be regulated by the central government under uniform laws. Legislation upon these subjects would tend to simplify the administration of justice, to introduce certainty into our systems of jurisprudence, to accommodate interstate intercourse, and to strengthen and solidify us as one people. But the power was not conferred; and conservatism has thus far restrained us from amending the Constitution. Until it is amended, the courts must enforce the fundamental law as it is and not as we might wish it had been. However desirable or however necessary federal power in any case may seem to be, if it was not expressly conferred upon Congress, it cannot be read into the Constitution by legislative declaration or by judicial decree. The Constitution "neither changes with time, nor does it in theory bend to the force of circumstances."[4] It is to-day what it was when Hamilton and Madison and Marshall wrote and argued in its support. The surrounding circumstances have changed, usages of life and trade and modes of thinking have changed, the manners and morals and ideas of

[1] *United States* v. *Fox*, 95 U. S. 670.

[2] *United States* v. *Dewitt*, 9 Wall. 41.

[3] *United States* v. *Boyer*, 85 Fed. Rep. 425.

[4] See *Ex parte Milligan*, 4 Wall. 2, 120; *In re Debs, Petitioner*, 158 U. S. 564, 591.

the functions and end of government and conceptions of civic duty and patriotism, all these have changed, but the Constitution remains as it was then. New conditions of society are evolving; systems of municipal law are being altered incessantly to meet novel and complicated conditions; but the fundamental principles of the Constitution are the same as they were when it was adopted. We are not at liberty to give the provisions of the Constitution new meanings because of considerations of expediency. If we could, then "there is no power which may not, by this mode of construction, be conferred on the general government and denied to the states."[1]

As is well known, at the time of the adoption of the Constitution, the ideas of the people in the thirteen states with respect to lotteries were radically different from what they are in our own times. We think lotteries immoral and necessarily detrimental to the welfare of the community. Other nations, particularly the Latin peoples, think otherwise. Our fathers considered lotteries, if honestly conducted, not only not injurious, but worthy of encouragement. Revenue for the support of the state governments, of colleges and churches and other public enterprises was at that time derived from lotteries, and Congress itself sanctioned lotteries. Was it the intention or understanding of the people of the respective states in adopting the Constitution to grant to the federal government the power to prevent the states from using lotteries among themselves as a source of state revenue, if they saw fit so to do? If the present question

[1] Chief Justice Taney in the *Passenger Cases*, 7 How. 283, 478; see also *Ex parte William Wells*, 18 How. 307, 311.

had arisen in the days of Marshall, when the public opinion of the country was not as hostile to lotteries as it is to-day,[1] and if the federal government had sought to prevent the people of any state from dealing as they saw fit in the lottery issues of other states, it would have been held that Congress had gone outside of the powers which had been conferred on it by the terms of the Constitution, and that the legislation was unconstitutional and void because not a regulation of commerce and because trenching upon the police power reserved to the states.

It was contended by the Government that, as Congress may regulate express companies and other interstate carriers as instrumentalities of commerce, the power is necessarily implied to determine what they shall and what they shall not transport; in other words, that Congress has exactly the same power over these instrumentalities of commerce that it has over the United States mails. Let this contention be upheld and it would follow that Congress could prohibit the transfer from state to state of any class of documents, of newspapers, periodicals, insurance policies, municipal bonds, notes, contracts, and everything in fact that is used in interstate intercourse among the people of the respective states. It is submitted that no such broad and all-pervading federal power was intended to be conferred in the power to regulate commerce.

An adjudication that Congress has no constitutional power to prohibit the carriage or transfer of papers which do not in their nature constitute commerce or relate to it, will in no way affect or limit the power of Congress to

[1] Thayer, Cases on Const. Law, vol. iv., p. 1774.

carry out effectively the express grant of the power to regulate interstate commerce. The suggestion has been made that, if the present legislation be not sustained, Congress would be denied the power to prohibit the carriage of diseased animals, of infectious commodities, and of obscene literature and pictures. The answer is that all these constitute primarily articles of commerce and that, having the power to regulate commerce in such commercial articles, Congress may prohibit the carriage or transfer of such as will tend to injure the community. They come within the range of the power of Congress, because they are commercial in their nature. Congress was given the power to compel the states to admit articles of commerce, notwithstanding any laws or police regulations of the respective states to the contrary. In all reason, therefore, the power must be implied to say what classes of articles of commerce should or should not be compulsorily brought into a state, and thus to protect the people, for otherwise there could be no protection. Having power to compel, it may safeguard. It is sometimes said that diseased animals or infectious goods or obscene literature do not constitute articles of commerce, and that their transport may be prohibited on that ground, but this is an incorrect use of terms. If they do not constitute articles of commerce, where did Congress find the power to exclude or regulate them? It is solely because they are inherently articles of commerce, although injurious and harmful articles of commerce, that Congress may say that it will regulate interstate commerce in them. Whatever may be the definition of lexicographers of the term "regulate," the reasonable and only true interpretation

of the Constitution is that when the power to regulate interstate commerce was granted to Congress, it included the power to determine what articles of commerce should or should not have the advantage of free and untrammeled transport or sale, notwithstanding the laws of any state. It would, however, be stretching the language to an extreme which, it is submitted, the court has not sanctioned, to hold that under the power to regulate commerce, Congress could prohibit the transfer or compel the free sale of documents which have no relation to commerce and which concern transactions that in their essence do not constitute commerce in any form or sense.

As was said by Mr. Justice Miller in the *Trade-Mark Cases*, 100 U. S. 82, 96:

> "When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several states, or with the Indian tribes. If not so limited, it is in excess of the power of Congress."

The government urged on the prior argument that because most lottery tickets are now made payable to bearer and pass by delivery, the decision might be placed upon the ground that lottery tickets were commercial commodities. But this contention involves the implication that such transactions would change their essential nature and the power of Congress cease if the mode of doing business were altered and lottery tickets were no longer made transferable by delivery but were confined to the indi-

vidual first purchasing, with whom a personal contract was made! The policy slips that Francis caused to be carried from Covington to Cincinnati were not negotiable or transferable by delivery. Such a ground of decision would be entirely too narrow, and, moreover, would be very easily circumvented. It would not reach what of all things is most important, namely, the lottery and policy circulars and advertisements. It would be simple and easy to print within a state the tickets or contracts or slips, or merely record the numbers (as is done on the race track), and then transfer from state to state only the advertisements and circulars and the notices of drawings.[1]

Insurance policies on goods in transit usually are not personal, but run to whom it may concern, or in favor of the owner of the property, and the title to that property passes by delivery of the bill of lading or warehouse receipt. The fact that an insurance policy, or insurance ticket as it is sometimes called, passed by delivery with the delivery of the bill of lading, would not render it a commercial commodity within the Constitution or bring insurance within the scope and protection of the commerce clause.

The argument that lottery tickets are commodities because they pass by delivery is, therefore, unsound, and the suggestion does not advance us in the solution of this far-reaching and important constitutional point. This case must be decided on far broader considerations than the narrow and accidental feature of title by delivery.

Congress cannot, of course, conclusively determine

[1] *France* v. *United States*, 164 U. S. 676, 682.

what is or what is not an article of commerce. That inquiry is essentially a judicial question. Otherwise, Congress could determine for itself the extent and limits of its own powers. A legislative fiat cannot make that commerce or a commercial commodity which in its essence and nature is not such. A transaction which in its nature or analysis is not commercial, cannot become so merely because Congress declares it commerce. Congress could not, for example, declare insurance to be commerce and compel the states to permit insurance companies to transact business within their borders on the ground that such companies were engaged in interstate commerce. Nor could Congress, under the guise of regulating interstate commerce, compel the states to permit the sale of Louisiana or other lottery tickets, and thus strike down all state police laws prohibiting the sale of such tickets. Surely a lottery agent indicted in New York under a statute of that state for selling Louisiana lottery tickets could not invoke the protection of the commerce clause.

A conviction under the statute of Virginia for selling lottery tickets for the national lottery authorized by the act of Congress of May 4, 1812, was sustained in the case of *Cohens* v. *Virginia*, 6 Wheat. 264. The state statute in that case forbade the sale within the state of any ticket in a lottery not authorized by the laws of Virginia. The main argument in the case was devoted to the question whether the lottery was not a fiscal agent of the government with which no state could interfere, and the court held that it was not. Chief Justice Marshall regarded the law as a penal regulation, having for its sole object the internal gov-

ernment of the state. Yet if the lottery tickets had been deemed articles of commerce, the Virginia act would obviously have been invalid as a regulation of commerce.[1]

A lottery contract is, in all its aspects, of the same nature as an insurance contract, which is an analogous form of wagering contract. They are both aleatory. An aleatory contract is one whose fulfillment depends on a future and uncertain event. Such are contracts of annuity, insurance, lottery and other forms of wagering. It cannot be denied that insurance policies are essentially wagers and constitute aleatory contracts substantially the same as the contract of lottery. Both forms of contract depend upon chance and uncertain events, and in principle cannot be distinguished in their nature.[2]

In the case of insurance, the company or underwriter says, "If by a future casualty your house, your barn, or your ship be lost, we will pay you so much." The lottery company similarly says, "If a certain number be drawn, we will pay you so much."

In the case of *Paul* v. *Virginia*, 8 Wall. 168, 183, it was distinctly held that the issuing of insurance policies in New York and sending them to Virginia, to be there delivered to the insured on payment of premium, was

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[1] *Welton* v. *State of Missouri*, 91 U. S. 275; *Webber* v. *Virginia*, 103 U. S. 344.

[2] Pothier's Obligations, Evans' Transl., vol. I., pp. 9–10; Louisiana Civil Code, act 1776; Civil Code of Spain of 1889, Title XII., U. S. Govt. Transl. 1899, pp. 230–232; May on Insurance, (4th ed.), vol. 1. p. 5; Clark on Contracts, pp. 405–406; Lawson on Contracts, secs. 284–287; Hollingsworth on Contracts, pp. 229–232; Anson on Contracts, (2nd Am. ed.), pp. 232–233; Angell on Fire & Life Insurance, pp. 12, 14; Joyce on Insurance, vol. 1, secs. 2, 7; Emerigon, Meredith's Transl., p. 13; Richards on Insurance, § 20.

not interstate commerce. The remarks and reasoning of the court, by Mr. Justice Field, apply as much to a lottery policy or ticket as to a policy of insurance, viz.:

> "Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the states any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

Again, in *Hooper* v. *California*, 155 U. S. 648, 653, 655, Mr. Justice White said:

> "Whilst it is true that in *Paul* v. *Virginia*, and in most of the cases in which it has been followed, the particular contract under consideration was for insurance against fire, the principle upon which these cases were decided involved the question of whether a contract of insurance, of any kind, constituted interstate commerce.

> The court in reaching its conclusion upon this question was not concerned with any matter of distinction between marine and fire insurance, but proceeded upon a broad analysis of the nature of interstate commerce and of the relation which insurance contracts generally bear thereto. . . .
>
> The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against 'the perils of the sea.'"

And, in *New York Life Insurance Co.* v. *Cravens*, 178 U. S. 389, 401, Mr. Justice McKenna said:

> "Is the statute an attempted regulation of commerce between the states? In other words, is mutual life insurance commerce between the states?
>
> That the business of fire insurance is not interstate commerce is decided in *Paul* v. *Virginia*, 8 Wall. 168; *Liverpool Ins. Co.* v. *Mass.*, 10 Wall. 566; *Phila. Fire Asso.* v. *New York*, 119 U. S. 110. That the business of marine insurance is not is decided in *Hooper* v. *California*, 155 U. S. 648. In the latter case it is said that the contention that it is 'involves an erroneous conception of what constitutes interstate commerce.'
>
> We omit the reasoning by which that is demonstrated, and will only repeat, 'The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against the 'perils of the sea.' And we add, or against the uncertainty of man's mortality."

The argument of the United States fails to establish any essential difference in principle between an insurance contract or policy and a lottery contract or ticket. If, in these three well considered cases,[1] this court has felt constrained to hold that insurance was not commerce and an insurance contract not a commercial transaction within the true meaning of the Constitution, for the reasons stated, then it must logically follow that lottery tickets, which are but another form of aleatory contracts, and relate in no sense even remotely to commercial commodities, are not commercial transactions. The court appreciated in *Hooper* v. *California*, 145 U. S. 648, 653, that it would be most desirable and expedient to hold that the interstate insurance business, and particularly marine insurance, should be free as part or an incident of commerce, but the court could not consistently adopt that view without disregarding the limitations of the Constitution. In that case, it was insisted on behalf of Hooper that marine insurance was necessarily a commercial transaction, constituting a part of foreign and interstate commerce, whilst it was insisted on behalf of the state of California that insurance was not commerce. The briefs on file show this conclusively. The question was thus distinctly presented, and the court, as above stated, felt constrained to hold that the commerce clause did not apply, although insurance is obviously an incident of commercial intercourse, as is also an immigrant agency.[2] Significant, too, is it that in the dissenting opinion of Mr. Justice Harlan in the *Hooper* case, there is not the slightest

[1] Reviewed again in *Williams* v. *Fears*, 179 U. S. 270, 277.

[2] *Williams* v. *Fears*, 179 U. S. 270, 273.

suggestion that insurance did constitute commerce. The dissent was placed on an entirely different ground.

The analogy between the business of insurance and lottery as understood and classed at the time of the adoption of the Constitution is most strikingly confirmed by the extract from Jefferson's writings submitted in the brief of the Government at p. 77, in which Jefferson is quoted as saying:

> "There are some other games of chance useful on certain occasions and injurious only when carried beyond their useful bounds. Such are insurances, lotteries, raffles, etc. These they do not suppress, but take their regulation under their own discretion. The insurance of ships on voyages is a vocation of chance, yet useful, and the right to exercise it, therefore, is left free. So of houses against fire, doubtful debts, the continuance of a particular life, and similar cases."

If, therefore, insurance policies, although connected with property which is the subject matter of interstate or foreign commerce, be not commerce within the true meaning of the commerce clause in the Constitution of the United States, it must follow that the other forms of aleatory contracts, such as lottery tickets or policies, do not come within the scope of that clause.

This court having definitely settled that a state regulation of the business of interstate or foreign insurance is not a regulation of commerce, does it not logically follow that the court could not uphold an act of Congress which attempted to regulate insurance or to forbid the carriage or transfer of insurance policies or tickets or other printed matter from state to state by agencies other than the mails?

Would it not be held that any such statute was not a regulation of interstate commerce in any proper meaning of the term, because insurance was not commerce, and that the power to regulate insurance had not been delegated to Congress? It is true that it is now desirable and expedient to have Congress regulate the subject of insurance, particularly in connection with vessels engaged and commodities used in interstate commerce[1]; but that consideration of expediency cannot draw to Congress a subject not delegated to it by the Constitution.

This feature of insurance also presents quite a striking example of the force of the suggestion heretofore made as to the difference in the nature of the power to regulate interstate commerce and foreign commerce. No one would challenge the power of Congress, by treaty or otherwise, to enact that foreign insurance companies should not be permitted to enter the United States by their agents or to send insurance policies for delivery there. Yet, if *Paul* v. *Virginia* and *Hooper* v. *California* and *New York Life Ins. Co.* v. *Cravens* are sound law and are not to be now overruled, Congress would have no power whatever to regulate the business of interstate insurance.

It has been held by this court in the case of *In re Rahrer*, 140 U. S. 545, that Congress may, as to any article of commerce, ordain that as soon as it comes within the state, even in its original package, it shall become subject to the operation of the police laws of that state together with other similar property within the borders of the state. It has been

[1] *Hooper* v. *California*, 155 U. S., 648.

suggested that this decision involves the proposition that Congress can practically prohibit interstate commerce in any article by permitting the states to interfere with and interdict the sale. This conclusion by no means follows. In the first place, Congress, by saying that a certain recognized article of commerce may be subjected to the police laws of the state, does not attempt to prevent the transportation of that article from state to state, and does not attempt in the slightest degree to prohibit interstate commerce in it. It must be evident that there is a vast difference between an act of Congress which declares that intoxicating liquors may be subjected to the police laws of a state after their transportation into a state, and an act of Congress which should prohibit the transfer of liquor from one state to another: the one would freely permit transportation and fully recognize the reserved powers and rights and wishes of the state; the other would absolutely prevent transportation and interfere with the police power of the states to permit or to prohibit. One state may desire to encourage what another wishes to prohibit; in one locality a certain article, *e. g.* intoxicating liquors, may be deemed beneficial; in another, noxious. A study of the reasoning of the court in the *Rahrer* case, 140 U. S. 545, shows that it was by no means the idea in that opinion that Congress might prohibit all interstate traffic in liquors. On the contrary, as Mr. Chief Justice Fuller said of the legislation then in question (at pp. 561 and 564):

> "In so doing, Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the states, or

> to grant a power not possessed by the states, or to adopt state laws. . . . It imparted no power to the states not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

It must be quite evident that any attempt by Congress to prohibit interstate traffic in liquor, notwithstanding the wishes of the various states and their local preferences, would be a departure which would cause much astonishment and opposition, whilst the legislation discussed in the *Rahrer* case involved the exercise by Congress of a power which recognizes to the fullest extent the jurisdiction of any state to permit or prohibit, according to its local policy.

In connection with this point, a legislative episode of 1836 may be mentioned in which an attempt was made to prevent the circulation of anti-slavery publications from one state to another by excluding them from the United States mails. For a number of years the circulation of such documents had caused bitter feeling in the southern states; and in 1835 the governor of North Carolina, in his address to the legislature, had urged the adoption of stringent provisions against the circulation of these publications, and had advocated a union of the slave states to protect themselves against this "pest".[1] In many of the southern states laws existed prohibiting all circulation of anti-slavery documents, whether they came from another state or not.[2] The general impression which prevailed in the South was that these regulations applied even to the United States postmast-

[1] 49 Niles' Register, 228.

[2] North Carolina, 1830, Laws, vol. 14. p. 10, and Maryland, 1831; 49 Niles' Register, 228. Cf. Rev. Sts. La. 1852.

ers, and rendered them liable to conviction for delivering the publications of the anti-slavery societies. Some postmasters, both in the North and South, excluded these publications from the mails that passed through their offices, and Kendall, the Postmaster General, though unable to find authority justifying him in ordering such action, intimated that in their position he should pursue a similar course.[1] In 1835, President Jackson, in his message, recommended that a bill be passed excluding these publications from the mails. This message was referred to a select committee, and on the 4th of February, 1836, a bill was reported by Mr. Calhoun making it a penal offense to transmit by the mails all anti-slavery documents which were prohibited by the states to which they were addressed. His doctrine was that Congress had no power under any clause of the Constitution to forbid directly the transmission of these publications, and that Congress had no power to interfere with the internal regulations of the states, but that in furtherance of the police regulations of the several states, Congress might exclude from the mails papers which were condemned by those police regulations.[2] Buchanan placed his support of the bill on broader grounds, and thought that, under the power of Congress to regulate the mails, it might exclude from the mails whatever it saw fit, and in the bill under discussion, he agreed to the adoption of state laws, not as a source of power, but as a convenient test of what publications should be held incendiary.[3] The opposition to the bill was based upon

[1] 48 Niles' Register, 447–448; 49 Niles' Register, 7–8.

[2] Cong. Globe, 24th Cong., 1st Sess., 10, 164, 165, 347.

[3] " " " App. 454.

constitutional as well as political grounds. The constitutional objection made was that it abridged the freedom of speech and of the press. This was the ground taken by Davis of Massachusetts [1] and by Webster.[2] On the 8th of June the bill was rejected by a vote of 25 to 19.[3]

The significance of this episode lies in the fact that Congress was grappling with the proposition to regulate the transmission from state to state of documents which lacked entirely the quality of merchandise. It was admitted throughout the debate that if Congress could not regulate this matter indirectly through the mails it could not regulate it at all; and no suggestion was ever made that such a bill could be passed under the commerce clause.

CONCLUSION.

For these reasons, it is submitted that that portion of the act of Congress of March 2, 1895, which prohibits the causing of lottery tickets to be carried from one state to another should be declared to be an exercise of power not delegated to Congress by the Constitution and consequently invalid, and that the regulation of lotteries must be held to be within the police power of the respective states to permit or prohibit as local public policy may dictate.

Washington, October Term, 1901.

WILLIAM D. GUTHRIE,
Of counsel for appellant Champion.

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[1] Cong. Globe, 24th Cong., 1st Sess., 348.
[2] " " " App. 453.
[3] " " " 539.

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# Supreme Court of the United States.

OCTOBER TERM, 1902.

NOS. 2 AND 80.

CHARLES F. CHAMPION, *Appellant,*

*vs.*

JOHN C. AMES, United States Marshal.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

No. 2.

JOHN FRANCIS *et al.*, *Petitioners,*

*vs.*

UNITED STATES.

Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

No. 80.

## REVISED BRIEF FOR APPELLANTS IN SUPPORT OF CONTENTION THAT THE FEDERAL ANTI-LOTTERY LEGISLATION IS UNCONSTITUTIONAL IN SO FAR AS IT PROHIBITS THE CARRIAGE OF LOTTERY TICKETS FROM ONE STATE TO ANOTHER BY ANY MEANS OTHER THAN THE MAILS.

WILLIAM D. GUTHRIE,
*Of counsel for appellant Champion.*

WASHINGTON, October Term, 1902.

[17,474 and 18,111.]

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### STATEMENT.

The case of *Champion* v. *Ames*, above entitled, was first argued at the October term, 1900, but a reargu-

ment was directed to be heard at the October term, 1901, at the same time as the hearing in *Francis* v. *United States*. The two cases were argued in October, 1901, and at the commencement of the present term were ordered to be again set for reargument as one case before a full bench.

The two cases present substantially the same question as to the power of Congress to suppress lotteries by prohibiting any person from causing lottery tickets to be carried from one state to another, and alike involve the constitutionality of a provision in the act of Congress of March 2, 1895 (c. 191, § 1; 28 Stat. 963), generally known as the federal anti-lottery act. The statute is entitled "An Act for the suppression of lottery traffic through national and interstate commerce and the postal service subject to the jurisdiction and laws of the United States," and section 1 reads as follows:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, that any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, or deposited in or carried by the mails of the United States, or carried from one state to another in the United States, any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, to be brought into the United States, or deposited in or carried by the mails of the United States, or transferred from one state to another in the same, shall be punishable in the first offense by

imprisonment for not more than two years or by a fine of not more than one thousand dollars, or both, and in the second and after offenses by such imprisonment only."

The act of Congress contains three separate features of anti-lottery legislation, which were enacted at different times, namely, (1) use of the United States mails, (2) importations from abroad, and (3) causing lottery tickets to be carried from one state to another by any means other than the mails. The Congress legislated for the first time in 1868 on the subject of suppressing lotteries, and the legislation then and for many years was confined to excluding lottery matter from the United States mails (act of July 27, 1868, 15 Stat. 196; act of June 8, 1872, 17 Stat. 302; act of July 12, 1876, 19 Stat. 90; Rev. Stat. §3894; act of September 19, 1890, 26 Stat. 465). In 1894 a provision was incorporated in the tariff law prohibiting the importation of lottery matter from abroad (act of August 27, 1894, 28 Stat. 509, 549). In 1895 the act now in question was passed, supplementing the provisions of the prior acts so as to prohibit the act of causing lottery tickets to be carried and lottery advertisements to be transferred from one state to another by any means or method (act of March 2, 1895, 28 Stat. 963). Reference to the purpose of suppressing lottery traffic first appeared in the title of the act of 1895.

In the *Champion* case, the offense charged in each count of the indictment is the act of delivering in the state of Texas to the Wells-Fargo Express, a carrier, a box containing papers, certificates or instruments purporting to be or represent tickets, chances, shares or interests dependent upon the event of a lottery, &c., for

transportation to Fresno, California (record in No. 2, pp. 8–13). The offense charged in the *Francis* case is a conspiracy to cause to be carried from Newport, in the State of Kentucky, to Cincinnati, in the State of Ohio, papers representing what are known as "policy" slips or tickets (record in No. 80, p. 2). Both cases are confined to the offense of causing lottery tickets or policy slips to be carried from one state to another, and neither case involves any question as to the transfer of lottery advertisements. Although, in the *Champion* case, the lottery tickets purport to be issued by the Pan-American Lottery Company, of Asuncion, in the Republic of Paraguay, the tickets are printed in English, and there is no suggestion in the indictment, evidence or argument that they were "brought within the United States from abroad." Indeed, for the purposes of the prior arguments, the government conceded that it might be assumed that the lottery tickets in question were printed in the United States and were not imported from abroad. The *Francis* case, however, presents no suggestion of international commerce or foreign relations or importations from foreign countries. Both cases arise under the third clause mentioned above, covered by the amendment of 1895, which prohibits the causing of lottery tickets to be carried from one state to another by any means other than the mails.

The nature of lotteries needs no description. Although in general use and favored at the time the Constitution was adopted and for many years afterwards, they have now generally grown into disrepute and though not legally *mala in se* they are *mala prohibita*.[1] The

[1] *Stone* v. *Mississippi*, 101 U. S. 814, 821.

nature or method of conducting the game of policy involved in the *Francis* case, as shown by the evidence, may be briefly described (106 Fed. Rep. 899). It differs somewhat from the policy game described by Mr. Justice Peckham in *France* v. *United States*, 164 U. S. 676, 678. In the *Francis* case, now before the court, it was shown that the principal office of the "policy" concern was located in Cincinnati, Ohio, that the drawings took place in an adjoining building or room, and that sub-offices or agencies were maintained in various places in that city and in other cities in Ohio and other states, at which patrons or players would select numbers in the drawings to be made in Cincinnati. One desiring to play such a game would choose three of the numbers from 1 to 78 inclusive, and write them upon a slip of paper, of which he kept a duplicate. He would hand his list of numbers, with figures to denote the sum paid, together with the money to pay for his chance, to the person in charge of the sub-office or agency to be transmitted to the principal office in Cincinnati. When these slips and the moneys were brought to the principal office, the drawing took place. Successive numbers from 1 to 78 inclusive were put into a wheel, and at each drawing twelve numbers were taken out. If the three numbers on the slip were of the twelve drawn from the wheel, the purchaser would win a prize. If not, he lost. A report of the drawings was sent back to the agency from which the slip came, and, if any purchaser had won a prize or, as it is termed, made a "hit," his slip was returned with the prize to be there delivered to him. In the instance shown by the testimony, the selection was made by the witness

Harrison at the Newport office. The defendant Reilley was claimed to be in charge of the principal office in Cincinnati, Francis in charge of the drawings, and Hoff in charge of the station in Newport. Edgar carried the slips from Newport to Cincinnati, and this carriage of the slips constituted the alleged overt act done in pursuance of a conspiracy in violation of the act of Congress.

ASSIGNMENT OF ERRORS.

The courts below erred in sustaining the prohibitory legislation in question because—

1. The suppression of lotteries is not an exercise of any power committed to the Congress by the Constitution of the United States, and is, therefore, in contravention of Article X of the Amendments, which provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

2. The sending of lottery tickets or policy slips does not constitute or evidence any transaction belonging to interstate commerce and is not within the scope of the power of the national government to regulate commerce among the states.

3. The power to regulate lotteries, and to permit or prohibit the sale of lottery tickets, is exclusively within the jurisdiction of the police power reserved to the states.

## I.

It cannot be reasonably doubted that the intention and purpose of Congress, in the legislation now before the court, was to suppress lotteries. There is no necessity to resort to the proceedings in Congress in which this purpose was openly avowed, for it appears on the face of the act itself expressly in its title and impliedly in its natural and reasonable effect. *Holy Trinity Church* v. *United States*, 143 U. S. 457, 462; *Henderson* v. *Mayor of N. Y.*, 92 U. S. 259, 268; *United States* v. *Fox*, 95 U. S. 670, 672; *Minnesota* v. *Barber*, 136 U. S. 313, 320. Yet hitherto no one has asserted that Congress has power to suppress lotteries any more than it has power to suppress insurance or speculation or other business between residents of different states not relating to interstate commerce. The suppression of lotteries or of any other harmful business is essentially an exercise of the police power exclusively within the domain of and expressly reserved to the several states. As Mr. Chief Justice Fuller said in *In re Rahrer*, 140 U. S. 545, 554:

> "The power of the state to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity, is a power originally and always belonging to the states, not surrendered by them to the general government nor directly restrained by the Constitution of the United States, and essentially exclusive. . . . In short, it is not to be doubted that the power to make the ordinary regulations of police remains with the individual states, and cannot be assumed by the National Government."

And again, in *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 13:

> "It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the states as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality.
>
> It will be perceived how far-reaching the proposition is that the power of dealing with a monopoly directly may be exercised by the general government whenever interstate or international commerce may be ultimately affected. The regulation of commerce applies to the subjects of commerce and not to matters of internal police."

Yet, on behalf of the United States it is now urged, in support of the legislation before the court, that there is a federal police power of the broadest scope to be administered by Congress in its absolute discretion, and not reviewable by the courts. Thus, in the revised brief of the United States, after submitting the proposition that the power to regulate interstate commerce includes the absolute and exclusive power to prohibit the transportation of anything or anybody across state lines, the following is stated (p. 53):

> "The power to prohibit exists for any purpose referable to the legitimate objects of govern-

ment, such as the preservation of health, the protection of morals and the safety of life."

It is submitted that no such absolute power in respect of police regulations was ever intended to be vested in Congress. On the contrary, it is well-settled that there is no such thing as a federal police power except in respect of those specific subjects delegated to Congress, such as treason, counterfeiting, piracies and felonies on the high seas and offences against the laws of nations. Of course, in exercising its delegated powers, Congress may create crimes and add the sanctions without which law exists but in name. Authority to legislate on a given subject necessarily includes authority to punish any one by whom the laws so made are violated. But this incidental power to enforce its legislation cannot extend the jurisdiction of Congress to subjects not delegated to the national government or support legislation not "necessary and proper for carrying into execution" the power to regulate commerce or any other delegated power. In the case at bar, the prohibition in question, it is true, may well be deemed "necessary and proper" for the suppression of lotteries, but it has no relation to interstate commerce and, therefore, is not "necessary and proper for carrying into execution" the power to regulate commerce among the states or for accomplishing any result connected therewith. And as Chief Justice Marshall said in *McCulloch* v. *State of Maryland*, 4 Wheat. 316, 423:

> "Should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this

> tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."

Mr. Justice Catron in *The License Cases*, 5 How. 504, 600, stated the true rule governing this class of cases, as follows:

> "And here is the limit between the sovereign power of the state and the federal power. That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the state; and that which does belong to commerce is within the jurisdiction of the United States. And to this limit must all the general views come, as I suppose, that were suggested in the reasoning of this court in the cases of *Gibbons* v. *Ogden*, *Brown* v. *The State of Maryland* and *New York* v. *Miln*."

And in the *Trade-Mark Cases*, 100 U. S. 82, 96, Mr. Justice Miller said:

> "When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several states, or with the Indian tribes. If not so limited, it is in excess of the power of Congress."

The question now at issue being the power of Congress to regulate by prohibition the sending of lottery tickets from one state to another, it is material to inquire whether or not the nature of lottery tickets is such that they may be regarded as articles of commerce and hence of interstate commerce when sent or carried across state lines. At most, they are mere evidences of contracts made wholly within the boundaries of a state, which contracts are valid or invalid according to the

municipal law of the state where made or attempted to be enforced. If the given subject thus attempted to be regulated be not commerce, it is not easy to perceive whence Congress derives the power to regulate it. Congress cannot conclusively determine what is or what is not an article of commerce. That inquiry is essentially judicial. Otherwise, Congress could determine for itself the extent and limit of its own powers and enlarge them at will. As Chief Justice Taney said in *The License Cases*, 5 How. 504, 574:

> "The Constitution itself does not attempt to define these limits. They cannot be determined by the laws of Congress or the states, as neither can by its own legislation enlarge its own powers, or restrict those of the other. And as the Constitution itself does not draw the line, the question is necessarily one for judicial decision, and depending altogether upon the words of the Constitution."

A legislative fiat cannot make that a commercial commodity which in its essential nature is not such. A transaction which is not commercial in its nature, cannot become so merely by the declaration of Congress. For example, Congress could not, under the guise of regulating interstate commerce, declare insurance to be interstate commerce and compel the states to permit insurance companies to transact business within their borders on the ground that such companies were engaged in interstate commerce. For the same reason, it has always been assumed that Congress could not compel the states to permit the sale of Louisiana or other lottery tickets, and thus strike down all state police laws prohibiting the sale of such tickets. Surely, lottery agents indicted in New

York under the statute of that state for selling Louisiana lottery tickets could not invoke the protection of the commerce clause. At any rate, no such proposition has ever been advanced or suggested until the present attempt to support the act of Congress.

A lottery ticket, like an insurance policy, a bill of exchange, a promissory note, a contract for sale of land or merchandise, whether negotiable or otherwise, is in itself only the evidence of a contract made or to be made between residents of different states. Until a transaction is had, it is meaningless and worthless. When sold, it represents nothing of value in itself but merely a means of enforcing a contract right. The subject-matter represented by the lottery ticket, the insurance policy, the bill of exchange or the promissory note, is a contractual relation between individuals which must be created and regulated under the laws of the state where the contract is made or where it is to be performed, just as any other contract between residents of different states, unless directly relating to interstate commerce.

In *Ex parte Jackson*, 96 U. S. 727, 735, Mr. Justice Field, delivering the unanimous opinion of the court, said:

> "But we do not think that Congress possesses the power to prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails. To give efficiency to its regulations and prevent rival postal systems, it may, perhaps, prohibit the carriage by others for hire, over postal routes, of articles which legitimately constitute mail matter, in the sense in which those terms were used when the Constitution was adopted, consisting of letters, and of news-

papers and pamphlets, when not sent as merchandise; *but further than this its power of prohibition cannot extend.*"

And in the subsequent case of *In re Rapier*, 143 U. S. 110, 133, Mr. Chief Justice Fuller stated that the *Jackson* case had held "that the transportation in any other way of matters excluded from the mails would not be forbidden." The question at bar was presented in *France* v. *United States*, 164 U. S. 676, 683, but was not necessary to the decision and was left undecided.

In the case of *Cohens* v. *Virginia*, 6 Wheat. 264, the nature of lotteries came before this court for adjudication, and a conviction under a statute of Virginia for selling lottery tickets for the national lottery authorized by the act of Congress of May 4, 1812, was sustained. The state statute forbade the sale within the state of any ticket in a lottery not authorized by the laws of Virginia. The main argument in the case was devoted to the question whether the lottery was not a fiscal agent of the government with which no state could interfere, and the court held that it was not. Chief Justice Marshall regarded the law as a penal regulation, having for its sole object the internal government of the state. Yet, if the lottery tickets had been deemed articles of commerce, obviously the Virginia act would have been invalid as a regulation of commerce.[1]

A lottery ticket, in all its aspects, is of the same nature as an insurance policy, which represents an analogous form of wagering contract. They are both aleatory, because in each case the contract is one whose fulfillment depends upon a future and uncertain event.

[1] *Welton* v. *State of Missouri*, 91 U. S. 275; *Webber* v. *Virginia*, 103 U. S. 344.

Such are contracts of annuity, insurance, lottery and other forms of wagering. It cannot be denied that insurance policies are essentially wagers and constitute aleatory contracts substantially the same as the contract of lottery. Both forms of contract depend upon chance and uncertain events, and in principle cannot be distinguished in their nature.[1]

In the case of insurance, the company or underwriter says, "If by a future casualty your house, your barn, or your ship be lost, we will pay you so much." The lottery company similarly says, "If a certain number be drawn, we will pay you so much."

In the case of *Paul* v. *Virginia*, 8 Wall. 168, 183, it was distinctly held that the issuing of insurance policies in New York and sending them to Virginia, to be there delivered to the insured on payment of premium, was not interstate commerce. The remarks and reasoning of the court, by Mr. Justice Field, apply as much to a lottery or policy ticket as to a policy of insurance, viz.:

> "Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value

[1] Pothier's Obligations, *Evans' Transl., vol. I, pp. 9-10; Louisiana Civil* Code, act 1776; Civil Code of Spain of 1889, Title XII., U. S. Govt. Transl. 1899, pp. 230–232; May on Insurance, (4th ed.), vol. 1, p. 5; Clark on Contracts, pp. 405–406; Lawson on Contracts, secs. 284–287; Hollingsworth on Contracts, pp. 229–232; Anson on Contracts, (2nd Am. ed.), pp. 232–233; Angell on Fire & Life Insurance, pp. 12, 14; Joyce on Insurance, vol. 1, secs. 2, 7; Emerigon, Meredith's Transl., p. 13; Richards on Insurance, § 20.

independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the states any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

Again, in *Hooper* v. *California*, 155 U. S. 648, 653, 655, Mr. Justice White said:

"Whilst it is true that in *Paul* v. *Virginia*, and in most of the cases in which it has been followed, the particular contract under consideration was for insurance against fire, the principle upon which these cases were decided involved the question of whether a contract of insurance, of any kind, constituted interstate commerce. The court in reaching its conclusion upon this question was not concerned with any matter of distinction between marine and fire insurance, but proceeded upon a broad analysis of the nature of interstate commerce and of the relation which insurance contracts generally bear thereto. . . .

The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against 'the perils of the sea.'"

And, in *New York Life Insurance Co.* v. *Cravens*, 178 U. S. 389, 401, Mr. Justice McKenna said:

> "Is the statute an attempted regulation of commerce between the states? In other words, is mutual life insurance commerce between the states?
>
> That the business of fire insurance is not interstate commerce is decided in *Paul* v. *Virginia*, 8 Wall. 168; *Liverpool Ins. Co.* v. *Mass.*, 10 Wall. 566; *Phila. Fire Asso.* v. *New York*, 119 U. S. 110. That the business of marine insurance is not is decided in *Hooper* v. *California*, 155 U. S. 648. In the latter case it is said that the contention that it is 'involves an erroneous conception of what constitutes interstate commerce.'
>
> We omit the reasoning by which that is demonstrated, and will only repeat, "The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against the 'perils of the sea.'" And we add, or against the uncertainty of man's mortality."

The argument of the United States fails to establish any essential difference in principle between an insurance contract or policy and a lottery contract or ticket. If, in these three well considered cases, this court has held that insurance was not interstate commerce and an insurance contract not a commercial transaction within the true meaning of the Constitution, for the reasons stated, then it must logically follow that lottery contracts, which are but another form of aleatory contracts, and relate in no sense even remotely to commercial commodities, are not commercial transactions. In *Hooper* v. *California*, 155 U. S. 648, 653, the

court appreciated that it would be most desirable and expedient to hold that the interstate insurance business, and particularly marine insurance, should be free as a part or an incident of commerce, but the court could not consistently adopt that view without disregarding the limitations of the Constitution. The act of sending insurance policies from one state to another was relied on as bringing the transaction within the commerce clause. In that case, it was insisted on behalf of Hooper that marine insurance was necessarily a commercial transaction, constituting a part of foreign and interstate commerce, because connected with the subject matter of interstate or foreign commerce, whilst it was insisted on behalf of the State of California that insurance was not commerce. The briefs on file show this conclusively. The question was thus distinctly presented, and the court, as above stated, held that the commerce clause did not apply, although insurance is obviously an incident of commercial intercourse.

Significant, too, is it that in the dissenting opinion in the *Hooper* case, there is not the slightest suggestion that insurance or the sending of policies from one state to another would constitute commerce within the true meaning of the Constitution.

The government seeks to distinguish these insurance cases on the ground that the transaction was not interstate commerce, because the agent of the foreign insurance company negotiated the contract of insurance in the state where the contract was to be finally completed and the policy delivered. No such distinction, however, is inferable from the language of any of

the insurance cases, and, certainly, it will not be claimed that it was intended to overrule *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 497, where it was held that "the negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce." *Hopkins* v. *United States*, 171 U. S. 578, 601. In *Collins* v. *New Hampshire*, 171 U. S. 30, 32, a package of oleomargarine was negotiated and sold by a resident agent of a foreign corporation, and the transaction was held one of interstate commerce. In *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28, 46, it was made clearer, if possible, that, had the business of interstate insurance been interstate commerce, the law in question would have been held unconstitutional. Referring to *Hooper* v. *California*, the court said:

> "All preceding cases were cited, and it was assumed as settled 'that the right of a foreign corporation to engage in business within a state other than that of its creation depends solely upon the will of such other state.' And the exception to the rule was stated to be 'only cases where a corporation created by one state rests its right to enter another and engage in business therein upon the federal nature of its business.'
>
> This exception was recognized in the case at bar, and the business of the plaintiff in error of a federal nature excluded from the operation of the judgment."

The business of a "federal nature" so excluded was that of transporting petroleum into Texas from other states.

In *Williams* v. *Fears*, 179 U. S. 270, 276, the State of Georgia taxed an emigrant agent whose

business was the hiring of persons to be sent without the state, or, in other words, the causing them to be carried from one state to another, and the question was whether that business was or was not interstate commerce. The court held that it was not, relying principally upon the insurance cases, *supra*, and quoting with approval at length from the language of Mr. Justice White in the *Hooper* case.

The logical result of the contention of the government is that the lottery business is so essentially different from insurance, that a foreign corporation engaged solely in conducting interstate lotteries could not be excluded by any state. It is, perhaps, unnecessary to remind the court that the contrary has, in substance, been repeatedly ruled in the cases which uphold the power of the states absolutely to prohibit lotteries of any kind.

It having been definitely settled by this court that a state regulation of the business of interstate or foreign insurance is not a regulation of commerce, does it not logically follow that the court could not uphold an act of Congress which attempted to forbid the carriage or transfer of insurance policies or tickets from state to state as a regulation of interstate commerce? Would it not be held that the object of such a statute was not to regulate interstate commerce at all in any proper meaning of the term, because insurance transactions were not interstate commerce, although incidents of commerce, and that the power to regulate insurance had not been delegated to Congress? It is true that it is now desirable and expedient to have Congress regulate the subject of insurance, particularly in

connection with vessels engaged and commodities used in interstate commerce; but that consideration of expediency cannot draw to Congress a subject not delegated to it by the Constitution.

In so far as the law now under consideration is aimed against the lottery ticket or policy slip, either at the place where the paper started or delivery was made, or at the place where the paper will find itself, or where the contract may take effect at the end of its journey, it is an attempt to interfere with the local municipal laws and police regulations of either place. Lotteries, wherever found, are not interstate commerce, but at most interstate wagering, such as insurance and other forms of speculation or gambling. It is true that lotteries, which were once popular and extensively engaged in, have gradually fallen into disrepute and have become the subject of prohibition by most of the states. But the gradual prohibition of lotteries under state police powers did not make them interstate commerce, or diminish the power of the respective states to permit, regulate or prohibit them. The time may come when an ordinary contract of insurance will be as unpopular as the contract evidenced by the lottery ticket. Would it then be possible, under the present Constitution, to sustain the power of Congress to forbid interstate insurance? The authoritative adjudications of this court forbid the idea. Again, the time may come when lotteries will be as popular as insurance contracts now are, or as popular as lotteries were when the Constitution was adopted. Would the court, in that event, be prepared to overrule the decision which the government now asks it to render?

As is well known, at the time of the adoption of the Constitution, the ideas of the people in the thirteen states with respect to lotteries were radically different from what they are in our own times. We think lotteries immoral and detrimental to the welfare of the community. Other nations, particularly the Latin peoples, think otherwise. Our fathers considered lotteries, if honestly conducted, not only not injurious but worthy of encouragement. Revenue for the support of the state governments, of colleges and churches and other public enterprises, at that time was derived from lotteries. In adopting the Constitution, was it the intention or understanding of the people of the respective states to grant to the federal government the power to prevent the states from using lotteries among themselves as a source of state revenue, if they saw fit so to do? If the present question had arisen in the days of Marshall, when the public opinion of the country was not as hostile to lotteries as it is to-day,[1] and if the federal government had sought to prevent the people of any state from dealing as they saw fit in the lottery issues of other states, it would have been held that Congress had gone outside of the powers which had been conferred on it by the terms of the Constitution, and that the legislation was unconstitutional and void because it was not a regulation of commerce, but an unwarranted interference with the police power reserved to the states.

[1] Thayer, Cases on Const. Law, vol. iv., p. 1772.

## II.

The argument on behalf of the United States as to the scope of the word *intercourse*, found in some of the opinions of the court, tends to prove altogether too much. It would make the power to regulate commerce embrace not merely "the entire sphere of mercantile activity in any way connected with trade between the states," but all the relations of life in so far as they involved intercourse between residents of different states. Such an argument, it is submitted, is completely answered by the language of Mr. Justice White in the *Hooper* case, *supra* (155 U. S. 648, 655), viz.:

> "If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states; and would exclude state control over many contracts purely domestic in their nature."

It cannot reasonably be assumed that the court in the *Hooper* case did not distinctly appreciate that the policies of insurance were sent or caused to be carried from one state to another and that the contract of insurance constituted intercourse between citizens of different states. But insurance, which has been authoritatively declared by this court not to be a branch of interstate commerce, although concededly an incident of commercial intercourse, could not become commerce merely from the fact that the insurance policy happened to be transported from one state to another by a common carrier for hire. The mere fact or method of carriage was considered in the insurance cases to be wholly immaterial, and the

determining factor was the real nature of the document itself.

The appellants do not dispute the proposition that the business of carriage for hire from one state to another or of facilitating such transportation or the transit of persons is a branch of interstate commerce within the authority of Congress to regulate, but it does not follow that Congress may, therefore, determine what may or may not be carried, irrespective of the nature of the thing carried. The contention seems to be that because the business of carrying persons, commodities, things and papers from one state to another constitutes a component part of interstate commerce, everything carried becomes *ipso facto* interstate commerce which Congress has power to prohibit. If such a broad power exists, it would, as we have seen, draw within the domain of the national government not only the regulation of interstate commerce, but of all intercourse, whether or not related to interstate commerce. It would enable Congress to regulate or prohibit every form of domestic intercourse and contractual relation between residents of different states, and to prohibit the transfer of promissory notes, of deeds, of bonds, of contracts for personal service, etc., etc. It is submitted that no such power was intended to be delegated to Congress by the grant of authority to regulate commerce among the several states.

Even if we concede, for the sake of argument, that the power to regulate interstate commerce involves the power to prohibit the transportation or transfer of articles of commerce which are in themselves injurious to interstate commerce, the argument of the government is not

advanced. For, if the Constitution delegated to Congress the express power to prohibit interstate commerce, that grant would not confer the power to prohibit directly or indirectly what was not interstate commerce. If Congress may prohibit the transportation of diseased animals or infected goods or obscene literature, it is because they are essentially commercial in their nature, and hence they are dealing with subjects of commerce. Such prohibition may be necessary and proper in order to protect the instrumentalities of interstate commerce and to safeguard such commerce. But this would not sanction the prohibition of things not constituting commerce, any more than Congress could forbid a citizen to go from one state to another on any business he saw fit and whatever his purpose might be. Thus, whilst it might well be recognized as necessary and proper to exclude diseased persons from railroads or steamboats, an entirely different proposition would be presented if an attempt were made to exclude persons in good health simply because they were going from one state to another to engage in the lottery business, which might be sanctioned and permitted by the laws of the states from and to which they were going.[1] Here, the lottery ticket is harmless and also worthless as a thing; it only becomes *malum prohibitum* because the local laws condemn the contract which it represents.

The following proposition submitted by the United States should be carefully considered (revised brief, p. 39) viz.:

> "*A fair test of the soundness of appellants' contention is to ask whether the State of Cali-*

[1] *Crandall* v. *Nevada*, 6 Wall. 35, 44, 48; *Slaughter-House Cases*, 16 Wall. 36, 75, 119; *Passenger Cases*, 7 How. 283, 492.

*fornia could lawfully have passed a law taxing the transportation of the box of lottery matter from Dallas, Tex., to Fresno, Cal., or could the state of Ohio have taxed the carriage of the policy ticket from Newport, Ky., to Cincinnati, Ohio. Their impotence to do so is predicated on the theory that such carriage is commerce."*

It would indeed be difficult to bring the question before the court more sharply than by means of the test thus stated. Concededly, the state could not tax the transportation of the box of lottery matter from one state to another, because that would be taxing the business of interstate commerce and not because it would be taxing lottery tickets as such. But does the government mean to suggest that an act of the State of California prohibiting the sale of lottery tickets would be absolutely void as a regulation of commerce? Yet, unless the doctrine of *Leisy* v. *Hardin*, *supra*, is to be overthrown, such an act would clearly be unconstitutional if lotteries are a branch of commerce, as argued by the government. Does the government seriously advance the proposition that, under the power to regulate commerce, Congress may sanction the sale of lottery tickets in any state notwithstanding the police laws of that state prohibit such sales, on the theory that it would be a regulation of commerce? If this contention be sound, then the laws now on the statute books of the states which absolutely prohibit the sale of lottery tickets are unconstitutional and void because a prohibition of interstate commerce!

Whilst the state is concededly impotent to tax the business of interstate carriage for hire of lottery tickets,

that fact does not in any degree militate against its power to tax or prohibit dealings in lottery tickets under the exercise of its reserved powers.

And the same may be said of that part of the argument in the revised brief of the government to the effect that the court cannot say that lottery tickets are not articles of commerce because Congress has seen fit to regulate them. It cannot, of course, be maintained that Congress, by its mere declaration that a lottery ticket or insurance policy constitutes a part of interstate commerce, can draw to itself the power to regulate and suppress the business of lotteries and insurance.

*Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, is strongly relied on by the government to support the alleged absolute prohibitive power of Congress in respect of interstate commerce. The extract quoted merely shows that Congress has power to prohibit the making or the performance of any contracts between individuals and corporations which directly and substantially regulate to a greater or less degree commerce among the states. It must be quite apparent that such a power is not only proper but absolutely necessary for carrying into execution the power of Congress to regulate interstate commerce; for, otherwise, the regulation of individuals and corporations might exclude or nullify any regulation by Congress. This, however, is widely different from an attempt to prohibit contracts which do not relate to interstate commerce. The court expressly reaffirmed the case of *United States* v. *E. C. Knight Co.*, *supra*, and clearly did not intend to limit the doctrine of that case.

## III.

Recurring again to the suggestion that *commerce* means *intercourse* in the broadest sense of that term, and includes all forms of transactions or intercourse among the people of the several states,[1] it will be assumed that if the word *commerce* was not intended to include all the significations and range of the word *intercourse*, then no argument will be approved which seeks to urge upon this court the proposition that it is within the judicial province to interpolate or substitute in place of *commerce* the word *intercourse*, which the framers of the Constitution, in their wisdom, saw fit not to use or insert. The word *intercourse*, in one of its significations or aspects, may well briefly describe commerce; yet, obviously, all intercourse is not commerce. Nor is there any warrant for the contention that Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat. 1, 189, or this court in later cases, defined the word *commerce* as embracing all the meanings of the word *intercourse*. What has been ruled is, not that *commerce* is the equivalent or synonym of *intercourse*, but that commerce is synonymous with "*commercial* intercourse," which no one could dispute. As Chief Justice Marshall said in that famous case (p. 189):

> "The subject to be regulated is commerce, and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit

[1] See remarks of Chief Justice Taney in note to *Passenger Cases*, 7 How. at p. 492.

> it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the *commercial* intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on *that* intercourse."

It is always necessary to bear distinctly in mind that, when adopting the Federal Constitution, the people of the United States deliberately "reserved to the states respectively or to the people" many objects which might have been appropriate for federal legislative action. The practical experience of our own times may lead us to regret that fear and jealousy of a centralized national government prevailed when the Constitution was adopted, and thwarted the foresight which would have extended and not curtailed the powers of the national government. But the general power to punish for crimes in connection with many matters which were or might become of national interest or concern was intentionally withheld. The student of the history of that critical period cannot fail to be impressed with the conviction that a grant to the federal government of police powers, such as the regulation and suppression of lotteries, could not have been secured, and that the Constitution itself would not have been ratified if any attempt had been made to give greater scope to federal legislation. It was then and may now be most desirable that lotteries, insurance,[1]

[1] *Hooper* v. *California*, 155 U. S. 648.

frauds,[1] negotiable instruments, trade-marks,[2] dealings in bills of exchange,[3] divorces, the manufacture of explosives and inflammable oils,[4] the inspection of slaughtering and packing,[5] emigrant agencies,[6] etc., should be regulated by the central government under uniform laws. Legislation upon these subjects might tend to simplify, accommodate and protect interstate intercourse. But the power was not conferred; and conservatism has thus far restrained us from amending the Constitution. Until it is amended, the courts must enforce the fundamental law as it is and not as we might wish it had been. However desirable or however necessary federal power in any case may now seem to be, if it was not expressly conferred upon Congress, it cannot be read into the Constitution by legislative declaration or by judicial decree. The Constitution "neither changes with time, nor does it in theory bend to the force of circumstances."[7] It is to-day what it was when Hamilton and Madison and Jay and Marshall wrote and argued in its support. The surrounding circumstances have changed, usages of life and trade and modes of thinking have changed, the manners and morals and ideas of the functions and ends of government, conceptions of civic duty and patriotism, all these have changed, but the Constitution remains as it was then. New conditions

[1] *United States* v. *Fox*, 95 U. S. 670.
[2] *Trade-Mark Cases*, 100 U. S. 82.
[3] *Nathan* v. *Louisiana*, 8 How. 73.
[4] *United States* v. *Dewitt*, 9 Wall. 41.
[5] *United States* v. *Boyer*, 85 Fed. Rep. 425.
[6] *Williams* v. *Fears*, 179 U. S. 270, 277.
[7] See *Ex parte Milligan*, 4 Wall. 2, 120, and *In re Debs, Petitioner*, 158 U. S. 564, 591.

of society are evolving; systems of municipal law are being altered incessantly to meet novel and complicated conditions; but the fundamental principles of the Constitution are the same as they were when it was adopted. We are not at liberty to give the provisions of the Constitution new meanings because of considerations of expediency. If we could, then "there is no power which may not, by this mode of construction, be conferred on the general government and denied to the states."[1]

A suggestion was made on the prior arguments that the state laws had been found to be ineffective for the suppression of lotteries, and that this court should, therefore, strain to sustain any federal legislation which was necessary or expedient to cope with the assumed evil. This is a suggestion which, even if true, should not be pressed. It is confidently submitted that present expediency or public necessity cannot expand the commerce clause or change its original scope and meaning. If the suppression of lotteries was exclusively within the province of the police power of the states according to the true interpretation of the Constitution, as understood at the time it was adopted, no present expediency or necessity can justify extending the commerce clause to cover it. If such an argument could be adopted, in its last analysis it would vest in Congress power to legislate in all criminal matters whenever the state laws were not duly enforced as to any acts or transactions arising from or affecting directly or indirectly intercourse among the inhabitants of the several states.

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[1] Chief Justice Taney in the *Passenger Cases*, 7 How. 283, 478; see also *Ex parte William Wells*, 18 How. 307, 311.

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An adjudication that Congress has no constitutional power to prohibit the carriage or transfer of mere evidences of contracts which do not in their nature constitute commerce or relate to it, will in no way affect or limit the power of Congress to carry out effectively the express grant of the power to regulate interstate commerce. The suggestion has been made that, if the present legislation be not sustained, Congress will be denied the power to prohibit the carriage of diseased animals, of infectious commodities, and of obscene literature and pictures. The answer is that all these constitute primarily articles of commerce and that, having the power to regulate commerce in such commercial articles, Congress may prohibit the carriage or transfer of such as will tend to injure interstate commerce. They come within the range of the power of Congress, because their interstate transportation may tend to affect interstate commerce. Congress was given the power to compel the states to admit articles of commerce, notwithstanding any laws or police regulations of the respective states to the contrary. In all reason, therefore, the power must be implied to say what classes of recognized articles of commerce should or should not be compulsorily brought into a state. But it would be stretching the language of the Constitution to an extreme which, it is submitted, the court has not sanctioned, to hold that under the power to regulate commerce, Congress could prohibit the transfer or compel the free sale of documents which have no relation to commerce and which concern transactions that in their essence do not constitute commerce in any

fair sense and which are within the police power of the states to prevent or prohibit.

The government urged on the prior argument that because most lottery tickets are made payable to bearer and pass by delivery, the decision might be placed upon the ground that lottery tickets were commercial commodities. But, of course, lottery tickets are mere evidences of a promise to pay upon the result of chance. This contention, moreover, involves the concession that such transactions would change their essential nature and the power of Congress cease if the mode of doing business were altered and lottery tickets were no longer made transferable by delivery but were confined to the individual first purchasing, with whom a personal contract was made! The policy slips that Francis caused to be carried from Covington to Cincinnati were not negotiable or transferable by delivery. Such a ground of decision would be entirely too narrow, and, moreover, would be very easily circumvented. It would be simple and easy to print within a state the tickets or contracts or slips, or merely record the numbers (as is notoriously done on the race track), and then transfer from state to state only the advertisements and circulars and the notices of drawings.[1]

It has been held by this court in the case of *In re Rahrer*, 140 U. S. 545, that Congress may, as to any article of commerce, ordain, that as soon as it comes within the state, even in its original package, it shall become subject to the operation of the police laws of that state together with other similar property within

[1] *France* v. *United States*, 164 U. S. 676, 682.

the borders of the state, and it has been suggested that this decision involves the proposition that Congress can practically prohibit interstate commerce in any article of commerce by permitting the states to interfere with and interdict the sale. This conclusion by no means follows. In the first place, Congress, by saying that a certain recognized article of commerce may be subjected to the police laws of the state, does not attempt to prevent the transportation of that article from state to state, and does not attempt in the slightest degree to prohibit interstate commerce in it. It must be evident that there is a radical difference between an act of Congress which declares that intoxicating liquors may be subjected to the police laws of a state after their transportation into a state, and an act of Congress which should prohibit the transfer of liquor from one state to another. The one would freely permit transportation and fully recognize the reserved powers and rights and wishes of the states; the other would absolutely prevent transportation and interfere with the police power of the states to permit or to prohibit as they might see fit. One state may desire to encourage what another wishes to prohibit; in one locality a certain article, *e. g.*, intoxicating liquors, may be deemed beneficial; in another, noxious. A study of the reasoning of the court in the *Rahrer* case, 140 U. S. 545, shows that it was by no means the idea in that opinion that Congress might prohibit all interstate traffic in liquors. On the contrary, as Mr. Chief Justice Fuller said of the legislation then in question (at pp. 561 and 564):

> "In so doing, Congress has not attempted to delegate the power to regulate commerce, or to

> exercise any power reserved to the states, or to grant a power not possessed by the states, or to adopt state laws. . . . It imparted no power to the states not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

It must be evident that any attempt by Congress to prohibit interstate traffic in liquor, notwithstanding the wishes of the various states and their local preferences, would be a departure which would cause much astonishment and opposition and be of doubtful constitutionality because of interference with the rightful jurisdiction of the states, whilst the legislation discussed in the *Rahrer* case involved the exercise by Congress of a power which recognizes to the fullest extent the jurisdiction of any state to permit or prohibit, according to its local policy.

In connection with this point may be mentioned a legislative episode of 1836, in which an attempt was made to prevent the circulation of anti-slavery publications from one state to another by excluding them from the United States mails. For a number of years the circulation of such documents had caused bitter feeling in the southern states; and in 1835 the governor of North Carolina, in his address to the legislature, had urged the adoption of stringent provisions against the circulation of these publications, and had advocated a union of the slave states to protect themselves against this "pest".[1] In many of the southern states laws existed prohibiting all circulation of anti-slavery documents, whether they came from another state or not.[2] The general im-

[1] 49 Niles' Register, 228.

[2] North Carolina, 1830, Laws, vol. 14, p. 10, and Maryland, 1831: 49 Niles' Register, 228. Cf. Rev. Sts. La. 1852.

pression which prevailed in the South was that these regulations applied even to the United States postmasters, and rendered them liable to conviction for delivering the publications of the anti-slavery societies. Some postmasters, both in the North and South, excluded these publications from the mails that passed through their offices, and Kendall, the Postmaster-General, though unable to find authority justifying him in ordering such action, intimated that in their position he should pursue a similar course.[1] In 1835, President Jackson, in his message, recommended that a bill be passed excluding these publications from the mails. This message was referred to a select committee, and on the 4th of February, 1836, a bill was reported by Mr. Calhoun making it a penal offense to transmit by the mails any anti-slavery documents which were prohibited by the states to which they were addressed. His doctrine was that Congress had no power under any clause of the Constitution to forbid directly the transmission of these publications, and that Congress had no power to interfere with the internal regulations of the states, but that in furtherance of the police regulations of the several states, Congress might exclude from the mails papers which were condemned by those police regulations.[2] Buchanan placed his support of the bill on broader grounds, namely, that, under the power of Congress to regulate the mails, it might exclude from the mails whatever it saw fit, and in the bill under discussion, he agreed to the adoption of state laws, not as a source of power, but as a convenient test of what publications should be held incen-

[1] 48 Niles' Register, 447–448; 49 Niles' Register, 7–8.
[2] Cong. Globe, 24th Cong., 1st Sess., 10, 164, 165, 347.

diary.[1] The opposition to the bill was based upon constitutional as well as political grounds. The constitutional objection made was that it abridged the freedom of speech and of the press. This was the ground taken by Davis of Massachusetts[2] and by Webster.[3] On the 8th of June the bill was rejected by a vote of 25 to 19.[4]

The significance of this episode lies in the fact that Congress was grappling with the proposition to regulate the transmission from state to state of documents which lacked entirely the quality of merchandise. It was admitted throughout the debate that, if Congress could not regulate this matter indirectly through the mails, it could not regulate it at all; and no suggestion was ever made that such a bill could be passed under the commerce clause.

## IV.

The entire argument on behalf of the United States, as to the extent of the commerce power of Congress, is crystalized in a series of propositions which it proposes to test by the answers to be given to the following questions propounded on page 63 of the revised brief:

> "If Congress can exclude obscene literature from foreign commerce, why not from interstate commerce also; and if it can exclude obscene literature, why can it not exclude lottery tickets? If it can exclude spirituous liquors from commerce with the Indian tribes, why not from interstate commerce also; and if it can exclude spirituous liquors, why can it not exclude lottery tickets?"

[1] Cong. Globe, 24th Cong., 1st Sess., App. 454.
[2] " " " " 348.
[3] " " " " 453.
[4] " " " " 539.

To the question, why may not the prohibitive power exercised in respect of foreign nations be applied to interstate commerce, and to the question why the same prohibitive power exercised in regulating trade with the Indian tribes may not be applied to interstate commerce, it should be sufficient to answer that there is nowhere in the Constitution or any of the amendments thereto a reservation of police powers or of any power either to any foreign nation or to any Indian tribe, and, therefore, the power of Congress over commerce with both is exclusive and absolute. Particularly as to the power of Congress over commerce with Indian tribes, if any further answer be necessary, it is found in the case of *United States* v. *43 Gallons of Whiskey*, 93 U. S. 188, 194, overlooked by the government in its discussion of this point, where Mr. Justice Davis, delivering the unanimous opinion of the court, said:

> "Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes,—a power as broad and as free from restrictions as that to regulate commerce with foreign nations. The only efficient way of dealing with the Indian tribes was to place them under the protection of the general government. Their peculiar habits and character required this; and the history of the country shows the necessity of keeping them 'separate, subordinate and dependent.' Accordingly, treaties have been made and laws passed separating Indian territory from that of the states, and providing that intercourse and trade with the Indians should be carried on solely under the authority of the United States."

If any further answer be necessary as to the difference between the extent of the power to regulate com-

merce with foreign nations and that among the several states, we may refer to the historical matter quoted in the government's revised brief (pp. 54–59), which conclusively shows that the conditions existing between the United States and foreign nations at the time of the adoption of the Constitution called for the exercise of very different powers. Thus, on page 58, is italicized an expression of Edmund Randolph, "*that until exclusion shall be opposed to exclusion, and restriction to restriction*, the American flag will be disgraced." It is confidently submitted that no argument is needed to show that, while commercial reprisals may be necessary as national expedients, such considerations can never be permitted to govern the action of Congress in regulating commerce among the several states. 2 Tucker on Constitution, 528–533. *Groves* v. *Slaughter*, 15 Peters, 449, 503; *Passenger Cases*, 7 How. 283, 406. Indeed, the clause guaranteeing the privileges and immunities of citizens would probably be held to nullify any such attempt of Congress. *Passenger Cases*, *supra*, at p. 492; *Crandall* v. *Nevada*, 6 Wall. 35, 44, 48; *Slaughter-House Cases*, 16 Wall. 36, 75, 119.

The insurance cases present a striking example of the difference in the nature of the power to regulate interstate commerce and foreign commerce. No one would challenge the power of Congress by treaty to provide that foreign insurance companies should be permitted to enter and do business in the United States and to send insurance policies for delivery there. Yet, if *Paul* v. *Virginia* and *Hooper* v. *California* and *New York Life Ins. Co.* v. *Cravens* are sound law and are not to be now overruled, Congress would

have no power whatever to regulate the business of interstate insurance or to compel a state to permit the residents of other states to transact an insurance business on the ground that it was a part of interstate commerce. In the one case the treaty power would be ample; in the other, the commerce power would be insufficient.

The misconceived idea that the power to prohibit importations of lottery matter from abroad would be necessarily denied if the interstate feature of the federal anti-lottery legislation now in question were not upheld, seems to have unduly impressed or influenced the court below in the *Francis* case, if, indeed, the idea did not mislead it (record in No. 80, p. 365; 106 Fed. Rep., p. 903).

The whole power to regulate every form of relations and intercourse with foreign countries resides in the sovereign national power created by the Constitution of the United States;[1] and every manner of intercourse in its broadest signification, whether commercial intercourse or otherwise, is to be regulated, permitted or prohibited by Congress alone.

The source and scope of this power to regulate international commerce are, in their very nature, essentially different from the source and scope of the power to regulate domestic commerce. In the case of international commerce, there is no limitation whatever upon the power of Congress and no implied or reserved power in the states. In the case of internal or interstate commerce, the only power Congress exercises is that expressly delegated, and that power is

[1] *Head Money Cases*, 112 U. S. 580, 591.

hedged in and circumscribed by the local police and municipal powers expressly reserved to the states. When regulating commerce or intercourse with foreign nations, the extent of the power delegated to the federal government is as unlimited as that of any other sovereignty. It rests not merely on the commerce clause, but likewise on the power to lay duties and imposts, to make treaties, to provide for the common defense, to wage war, etc. It is essentially the exercise of a political administrative act. But when considering a statute regulating internal or interstate commerce, the exercise of power in the given case is limited to that expressly granted, and must not trench upon "the powers not delegated to the United States by the Constitution," but by that instrument expressly "reserved to the states respectively, or to the people" [1]—considerations and limitations which have no weight in regulating foreign affairs.[2] In regulating what is generally termed international commerce and intercourse, Congress must, of necessity, have ample power to prevent the introduction of foreign lottery matter, and, in order to render such inhibition effective, it must have power to prohibit the possession of such matter or its transfer from one state to another just as fully as it may prohibit the possession or carriage or transfer of smuggled imports or contraband goods even from point to point within a state. But many of the considerations which are of a national character and which arise between the

[1] Tenth Article of Amendment to the Constitution of the United States.

[2] Indeed, Madison placed the power to regulate intercourse with foreign nations in a class distinct and separate from the power to regulate interstate commerce. The Federalist; Hamilton's Works, Lodge's ed., vol. 9 pp. 250, 258, 262.

United States, as a nation, and foreign nations wholly disappear when interstate relations are contemplated.

It may, therefore, be conceded that Congress, under the plenary power to regulate our relations with foreign countries, may well exclude persons, commodities, or printed matter of any nature whatsoever, whether or not relating to or connected with commerce. The power of Congress—the legislative power of a sovereign nation—to exclude foreign persons or commodities or printed matter in its judgment and discretion need not be challenged in the slightest degree. But no one would seriously suggest that any class of American citizens could be excluded or deported under the same power which enables Congress to exclude or deport aliens. *United States* v. *Wong Kim Ark*, 169 U. S. 649, 653. When we say that Congress may exclude or deport foreigners or their products or publications from the United States, or pass a non-intercourse law, or place an embargo upon foreign ships or manufactures,[1] we are but recognizing the ancient doctrine of international law that an alien or an alien's property comes into the territory of a sovereign nation only by its sufferance, and may be excluded at its will. And whether the exclusion be for the purpose of self-defense, or as an incident to the regulation of imports or commerce, or otherwise, the right to exclude or deport or prohibit is as much the sovereign's prerogative as the power to make treaties giving to foreigners the privilege of abiding or

[1] *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 659; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 707, 712; *United States* v. *Brigantine "William,"* 2 Hall's Am. Law Journal, 255; *Gibbons* v. *Ogden*, 9 Wheaton, 1, 191, 192.

of bringing or selling their goods or publications within the sovereign's domain. That this attribute of sovereignty under the treaty power has been surrendered by and does not belong to the states cannot for a moment be doubted, for the states are expressly forbidden to enter into any form of treaty.[1]

The power to regulate commerce among the several states, it is true, is given in the same section and in the same language as the power to regulate foreign or international commerce, but the scope of the power is not the same in both cases and may not be exercised to the same extent. The same terms in relation to separate subjects frequently differ in meaning and scope.

### Conclusion.

For these reasons, it is submitted that that portion of the act of Congress of March 2, 1895, which prohibits the causing of lottery tickets to be carried from one state to another should be declared to be an exercise of power not delegated to Congress by the Constitution and consequently invalid, and that the regulation of lotteries must be held to be within the police power of the respective states to permit or prohibit as local public policy may dictate.

Washington, October Term, 1902.

William D. Guthrie,

Of counsel for appellant Champion.

[1] Section 10 of Article I of the Constitution of the United States.

No. 1086. Sept. 80

By. of Counsel for Motion for Pet'r.

FILED
APR 8 1901
JAMES H. McKENNEY,
Clerk

Filed April 8, 1901.

IN THE

# Supreme Court of the United States of America.

——— TERM, 1901.

JOHN FRANCIS, ANTHONY HOFF and JOHN EDGAR,
*Petitioners,*
*vs.*
THE UNITED STATES OF AMERICA,
*Respondent.*
} Criminal.

Petition for a writ of *certiorari*, requiring the Circuit Court of Appeals for the Sixth Circuit, to certify to the Supreme Court, for its review and determination, the case of John Francis, Anthony Hoff and John Edgar, Appellants, against the United States of America, Respondent.

MILLER OUTCALT,
THOS. F. SHAY.
*Attorneys for Petitioners.*

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*To the Honorable, the Supreme Court of the United States:*

The petition of John Francis, Anthony Hoff and John Edgar, respectfully shows to this Honorable Court as follows:

First. That on the 6th day of October, A. D. 1899, a certain bill of indictment was returned and presented by the grand jurors of the United States of America, within and for the Southern District of Ohio, against the petitioners, as appears more fully in the certified copy filed herewith as Exhibit "A", and which said indictment was endorsed on the cover,—"Indictment for Conspiracy. Sec, 5440. Am. 1st Supp. 264. Act Mar. 2, 1895. 2 Supp. 435. A True Bill. J. M. Robinson, Foreman of the Grand Jury."

Second. That thereafter in said District Court, said petitioners severally filed their certain *motions to quash* said bill of indictment, for the reasons and upon the grounds more fully set forth in said motions, as appears from the record filed herewith and marked Exhibit "A."

Third: That thereafter, upon consideration of said *motions to quash*, by said District Court, the same were overruled, to which ruling and judgment of said Court, the petitioners severally excepted. And thereupon said cause proceeded to trial, and such proceedings were thereupon had that at the conclusion of the evidence for the United States, plaintiff therein, each of said petitioners filed his *motion to direct the jury to acquit* him, which, on consideration by said Court, were overruled, and said petitioners duly excepted. And said cause being thereupon argued by counsel, and said jury being charged by the Court, the same was submitted to said jury, and resulted in a verdict of guilty, as to each of said petitioners, as appears from said record, Exhibit "A."

Fourth. That thereafter, and in due time, each of said petitioners filed his certain *motion in arrest of judgment*, for the reasons and upon the grounds as more fully appear from said record, marked Exhibit "A". And each of said petition-

ers also filed his certain motion for a new trial, for the reasons and upon the grounds as more fully appear from said record, marked Exhibit "A". All of which motions, were, on consideration by said Court, overruled, and judgment duly pronounced against each of said petitioners as appears of record. And to each and all of said rulings and judgments of said Court, said petitioners each severally excepted

Fifth. That thereafter, in due time, said petitioners presented to said Court their certain *bill of exceptions* which said Court finding to have been reasonably taken and observed, and the same being found by the Court to be a true bill of exceptions in all respects, the same was allowed, signed, sealed, and upon the motion of said petitioners, made a part of the record in this case.

Sixth. That thereafter, and in due time, there was filed in the clerk's office of said Court, a certain *petition for writ of error*, for and on behalf of said petitioners, together with an *assignment of errors*, all of which more fully appears in said record, marked Exhibit "A". And thereupon, on the same day, an entry was made upon the journal of said court, wherein and whereby "it being made to appear to the Court that the defendant (nameing them) have filed their petition for allowance of a writ of error and assignment of errors herein, and it being further made to appear to the Court that the said defendants intend to prosecute said writ of error," it was ordered that the said writ of error be, and the same thereby was allowed, and that the same operate as a supersedeas, upon the said defendants giving bonds with surety to the satisfaction of the clerk of this Court, which was accordingly done.

Seventh. That thereafter, in due time, and in accordance with the laws in such cases made and provided, and in strict

conformity with the rules and practice of said Courts, said petition for said writ of error and said assignments of error. were diligently prosecuted by said petitioners to the United States Circuit Court of Appeals for the Sixth Circuit, for the correction of manifest errors which said petitioners claimed had happened, to their great damage; and such proceedings were had in said cause in said Circuit Court of Appeals, that said petition for a writ of error and said assignments of error, were presented to said Court, and the same were argued and submitted to said Court on January 17, 1901, and the judgment of said Court prayed thereon.

Eighth. That thereafter, to-wit, on February 12, 1901, said cause was decided by said Circuit Court of Appeals, and by the consideration of said Court the judgment of said District Court was affirmed, as appears of record herein.

A certified copy of the entire record of the said cause in the Circuit Court of Appeals is herewith furnished as part of this application, in conformity with Rule 37 of this Honorable Court relative to cases from the Circuit Court of Appeals, and the same is marked Exhibit "A."

Your petitioner is advised and believes that the said judgment of the said Circuit Court of Appeals in said case is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination, under and in conformity with the provisions of the sixth section of the act of Congress, entitled "An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes. Approved March 3, 1891." The said case being made final in the said Circuit Court of Appeals by the said act.

The said case was decided in the said Circuit Court of Appeals against your petitioners, when it should have been in their favor, because of manifest errors apparent upon the face of the record herein, and for the following manifold reasons, to-wit:

First. Because it is manifest from the record herein that said Circuit Court of Appeals erred in affirming the action of said District Court in overruling the several *motions to quash* said indictment filed by said petitioners, respectively, for the reasons therein stated, among others, namely:

(a) Because the same charges no offense against any valid law of the United States.

Second. Because said Circuit Court of Appeals erred in affirming the action of the said District Court in overruling the several *motions to acquit* filed by the petitioners, respectively, at the conclusion of the evidence offered by the Government, for the following reasons, to-wit:

(a) Because said indictment does not charge an offense within the jurisdiction of said Court.

(b) Because the facts and statements contained in the indictment charge no crime against any valid law of the United States.

(c) Because said act of March 2, 1895, is not a valid or constitutional act.

Third. Because said Circuit Court of Appeals erred in affirming the action of the said District Court in overruling the several *motions in arrest of judgment*, filed by the petitioners, respectively, for the reasons following, to-wit:

(a) Because said indictment does not charge an offense within the jurisdiction of this Court.

(b) Because the facts and statements contained in said indictment charge no crime against any valid law of the United States.

(c) Because said act of March 2, 1895, is unconstitutional and void.

## ARGUMENT.

Your petitioners respectfully do represent and show to this Honorable Court that they were convicted at the February Term, 1900, of the District Court of the United States, within and for the Southern District of Ohio, Western Division, upon an indictment presented and returned in said Court, in which they were charged with violating Section 5540 of the Revised Statutes of the United States, which in terms makes it a crime to conspire to commit an offense against the United States.

The overt act which they were charged with having conspired to commit was the alleged causing to be carried from one state to another, to-wit, from Newport, Kentucky, to Cincinnati, Ohio, papers, certificates and instruments purporting to be and to represent; as they then and there well knew, tickets, chances, shares and interests in, and dependent upon the event of lottery and similar enterprises offering prizes dependent upon lot or chance.

Upon conviction sentences were pronounced against said petitioners, and thereafter said petitioners duly prosecuted error to the Circuit Court of Appeals for the Sixth Circuit, and upon submission of said cause and writ of errors to said Circuit Court of Appeals, the judgment of said District Court was affirmed.

The overt act charged as criminal was alleged to be such because it was a violation, as was charged, of the first section of the act of March 2, 1895, which is as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, or deposited in or carried by the mails of the United States, or carried from one state to another in the United States, any paper, certificate or instrument, purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of a lottery, so called gift concert or similar enterprise, offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so called gift concert or similar enterprise, offering prizes upon lot or chance, to be brought into the United States, or deposited in or carried by the mails of the United States, or transferred from one state to another in the same, shall be punishable in the first offense by imprisonment for not more than two years, or by a fine of not more than one thousand dollars, or both, and in the second offense by such imprisonment only."

The validity of the first section of the act just recited, was called in buestion during the trial by the several *motions to quash* and *motions to acquit*, and after verdict, by *motions in arrest of judgment*.

Proper exceptions to the rulings of the court thereon were duly taken and reserved, and were fully set forth and indicated in their certain bill of exceptions, and were distinctly and accurately noted and alleged in said *petition for a writ of error* and said *assignments of error*, and the question of the

validity of said Act of March 2, 1895, is again now respectfully presented and urged upon the consideration of this Honorable Court.

It is contended, in the first place, that the papers, certificates and instruments mentioned in the indictment herein as being carried by the persons named from Newport, Kentucky, to Cincinnati, Ohio, are not merchandise. Therefore the act in question is unconstitutional.

Second. The only possible claim by which the act in question could be held valid, is that it is a regulation of "commerce."

What is commerce? "It is an interchange or mutual change of goods, wares, productions or property of any kind between nations or individuals, either by barter or by purchase and sale, trade, traffic."

The design and object of the power embraced in Article 1, Sec. 8, of the Constitution of the United States was to establish a perfect equality among the several States as to commercial rights," etc.

While the largest lattitude may be given Congress to regulate the mail, excluding therefrom lottery matter of every kind, as this Court has said in the Jackson case (see Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S., 1),

> "Taking the term commerce in its broadest acceptation—supposing it to embrace not merely traffic, but the means and vehicles by which it is prosecuted—can it properly be made to include objects and purposes such as those contempiated by the law under review?"

Veazie *v.* Moor, 14 How., 573.

Telegrams would become an instrumentality of commerce, but would lotteries? See,

Paul *v.* Virginia, 8 Wall., 168, 183.
Crandall *v.* Nevada, 6 Wall., 35.
Phila. Fire Ins. Co. *v.* New York, 119 U. S. 110.

"Every species of property which is the subject of commerce, or which is used or even essential to commerce, is not within the control of Congress."

U. S. *v.* Steffins, 100 U. S., 95.

The legislation of Congress as to trade marks is null and void for want of constitutional authority.

In Phila. Fire Ins. Co. *v.* New York, 119 U. S., 118, this Court decides that the issuance of a policy of insurance is not a transaction of commerce.

In Welton *v.* Missouri, 91 U. S., 280, the Court says:

> "Commerce is a term of the largest import. It comprehends intercourse for the purpose of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities between the citizens of our country and the citizens of different States. The power to regulate it embraces all the instruments by which such commerce may be conducted. So far as some of these instruments are concerned, some subjects which are local in their operation. Further than this its power of prohibition can not extend."

To hold that Congress has the power to regulate or prohibit the carrying of tickets for a lottery on the ground that it is "commerce," is to recognize the fact that a lottery is a commercial transaction.

Gibbons *v.* Ogden, 9 Wheat., 1.
City of New York *v.* Mila. 11 Peters, 102.
Brown *v.* State of Maryland, 12 Wheat., 419.
License Cases, 5 How., 504.
Veazie *v.* Moor, 14 How., 573.

Commercial intercourse is an element of commerce which comes within the regulating power of Congress. It includes the means by which commerce is carried on (Hare on Com. Law, 479 and 1257), and includes as well instrumentalities of commerce. See,

Pensacola Co. *v.* Western Union Tel. Co., 96 U. S., 1.

It has been held that the states may provide regulations until Congress acts in reference to them; but where the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive on all state authority.

And in the Trade Mark Cases, 100 U. S., 95, this Court says:

> "Every species of property which is the subject of commerce, or which is used or is even essential in commerce, is not brought by this cause within the control of Congress. The barrels and casks, the bottles and boxes in which alone certain articles of commerce are kept for safety and by which their contents are transferred from the seller to the buyer, do not thereby become subjects of Congressional legislation more than other property."

Nathan *v.* Louisiana, 8 How., 73.

In Paul *v.* Virginia, 8 Wall., 168, this Court held:

> "That a policy of insurance made by a corporation of one state on property situated in another, was not

an article of commerce, and did not come within the purview of the clause we are considering."

See "Commerce."

Veazie *v.* Moor, 14 How., middle p. 573.

It must be remembered that the act in 28 Statutes at Large 963, *supra*, is not an interstate commerce act nor an amendment thereto.

In Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. (*supra*) at page 9, the Court, through Chief Justice Waite, defines why a telegraph company may be considered within the power of Congress to regulate as commerce, to wit:

> "It is indispensable as a means of intercommunication, but especially is it so in commercial transactions. The statistics of the business before the recent reduction in rates show that more than eighty per cent. of all the messages sent by telegraph related to commerce. Goods are sold and money paid upon telegraphic orders. Contracts are made by telegraphic correspondence, cargoes secured, and the movements of ships directed. The telegraphic announcement of the markets abroad regulates prices at home, and a prudent merchant rarely enters upon an important transaction without using the telegraph freely to secure information. It is not only important to the people, but to the government. By means of it the heads of the departments in Washington are kept in close communication with all their various agencies at home and abroad, and can know at almost any hour, by inquiry, what is transpiring anywhere that affects the interests they have in charge. Under such circumstances it cannot for a moment be doubted that this powerful agency of commerce and intercommunition comes within the controlling power of Congress, certainly as against hostile State legislation."

We maintain, therefore, that it is not within the constitutional power of Congress to prevent the carrying from one State to another, except perhaps through the mails, papers instruments or certificates purporting to be a betting interest in a lottery.

Granting, for argument, that it could prevent the carriage through the mails of a newspaper from one State to another, which printed a lottery scheme by virtue of its exclusive power and control over the mails, but could it prohibit the carriage by other means of newspapers from one State to another giving the result of such lottery? As well might it be claimed that it would be within the power of Congress to prohibit the telephoning from Newport, Ky., to Cincinnati, Ohio, a play in a lottery to be drawn on some subsequent day.

If congress has no power to prohibit a person from memorizing the numbers drawn from a wheel and communicating them by word of mouth from one State to another, or if it is not within the power of Congress to prevent the transportation by other means than through the mails or newspapers published in one State to another, giving such information as a matter of news, how can it prevent the carrying from one State to another by means other than the mails? Where is the commerce which it seeks to regulate, even if a lottery could in any sense be considered a species of commerce?

Chief Justice Fuller, in the case of U. S. vs. Knight, 155 U. S. R., page 12, employs this language as a part of his opinion: "Commerce undoubtedly is traffic."

Said Chief Justice Marshal:

> "But it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is

regulated by prescribing rules for carrying on that intercourse. That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State."

And cites in support thereof:

Gibbons *v.* Ogden, 9 Wheat., 1, 189, 210.
Brown *v.* Maryland, 12 Wheat., 419, 448.
The License Cases, 5 How., 504, 599.
Mobile *v.* Kimball, 102 U. S., 691.
Bowman *v.* Chic. & N. W. Ry., 125 U. S., 465.
Leisy *v.* Hardin, 135 U. S.. 100.
In re Rahrer, 140 U. S., 545, 555.
See page 12, U. S. *v.* Knight, 155 U. S.

It is vital that the independence of the commercial power and the police power, and the delineation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnished the strongest kind of union, the other is essential to the preservation of the autonomy of the states, as required by a dual form of government; and acknowledged evils however grave and urgent they may appear to be, had better be borne than the risk to be run, in the effort to supress them of more serious consequences by resort to expedients of doubtful constitutionality.

The regulation of commerce applies to the subjects of commerce and not to matters of internal police.

See page 13, 155 U. S. *v.* Knight.
Paul *v.* Virginia, 8 Wall., 168.
Hooper *v.* California, 155 U. S., p. 648.
Phila. Ins. *v.* New York, 119 U. S., 110.

Wherefore you petitioners respectfully pray that a writ of *certiorari* may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding the said Court to certify and send to this Court on a day certain to be therein designated a a complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein entitled John Frances, Anthony Hoff and John Edgar, Appellants, *v.* the United States of America, Respondent. Number 849. To the end that the said case may be reviewed and determined by this Court as provided in Section 6 of the Act of Congress entitled, "An Act to Establish Circuit Courts of Appeals, and to Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States, and for Other Purposes." Approved March 3, 1891. Or that you petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said act; and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioners will ever pray, etc.

MILLER OUTCALT,
THOS. F. SHAY.
*Attorneys for Petitioners.*

STATE OF OHIO, } ss.
HAMILTON COUNTY, }

John Frances, Anthony Hoff and John Edgar each being duly sworn according to law, severally depose and say that they are the petitioners in the above written petition, and

have read said petition and the same is true of their own knowledge, except such matters as are therein stated as information and belief, and as to such statements they believe the same to be true.

JOHN FRANCES.
ANTHONY HOFF.
JOHN EDGAR.

Subscribed and sworn to before me this 30th day of March, 1901.

CHAS. E. BEMISS,

*Notary Public in and for said County and State.*

No. 293. 80.

By. of Edmunds for Petitioners.

Office Supreme Court U.S.
FILED
OCT 11 1901
JAMES H. McKENNEY.

Filed Oct. 11, 1901.

# Supreme Court of the United States.

JOHN FRANCIS *et al.*

*vs.*

THE UNITED STATES.

October Term, 1901.
No. 293.

BRIEF ON THE CONSTITUTIONAL QUESTION INVOLVED, BY GEORGE F. EDMUNDS OF COUNSEL FOR THE PETITIONERS.

## Statement.

This was a prosecution founded on section 5440 of the Revised Statutes, alleging a violation of the Act of March 2d, 1895, by the personal carriage by the petitioners, or some of them, of the lottery papers mentioned in the Act, from the State of Kentucky into the State of Ohio. The paper or papers carried were slips containing figures alleged to indicate numbers which might be drawn from the lottery wheel, and which numbers, if corresponding with the numbers on the paper, would entitle the person who wagered on those numbers to a prize. The petitioners were found guilty, and the case was carried from the District Court to the Circuit Court of Appeals, which affirmed the judgment. The point that the Act of Congress of March, 1895, was unconstitutional was made and insisted upon in the

trial court and in the Circuit Court of Appeals. It is now assigned for error (among many others not involving the constitutional question) that the court below held the Act of Congress in question, as applied to the case of the petitioners, to be valid.

The suggestions of the undersigned will be devoted exclusively to the constitutional question without prejudice to other important points presented in other briefs.

Section 5440 is as follows:—

> "SEC. 5440. If two or more persons conspire "either to commit any offense against the United "States, or to defraud the United States in any "manner or for any purpose, and one or more "of such parties do any act to effect the object "of the conspiracy, all the parties to such con- "spiracy shall be liable to a penalty of not less "than one thousand dollars and not more than "ten thousand dollars, and to imprisonment not "more than two years."

The Act of March, 1895, is as follows:—

> "CHAP. 191. An act for the suppression of "lottery traffic through national and interstate "commerce and the postal service subject to the "jurisdiction and laws of the United States.
>
> "Be it enacted by the Senate and House of "Representatives of the United States of Amer- "ica in Congress assembled: That any person "who shall cause to be brought within the "United States from abroad, for the purpose of "disposing of the same, or deposited in or car- "ried by the mails of the United States, or "carried from one State to another in the United

"States, any paper, certificate or instrument pur-
"porting to be or represent a ticket, chance,
"share or interest in or dependent upon the
"event of a lottery, so-called gift concert, or
"similar enterprise, offering prizes, dependent
"upon lot or chance, or shall cause any adver-
"tisement of such lottery, so-called gift concert
"or similar enterprise, offering prizes dependent
"upon lot or chance, to be brought into the
"United States, or deposited in or carried by
"the mails of the United States, or transferred
"from one State to another in the same, shall
"be punishable in the first offense by imprison-
"ment for not more than two years or by a
"fine of not more than one thousand dollars,
"or both, and in the second and after offenses
"by such imprisonment only."

**Points.**

1.—The passage of lottery tickets, either drawn or undrawn, from one State to another is not commerce. They are neither goods, wares, nor merchandise. They are the evidence of a chance to obtain a right to a sum of money, or, if the lottery has been drawn and the ticket has won a prize, the evidence of the right of any bearer to the prize. The Act does not prohibit them as such but only as possessing a quality which Congress thought injurious to the morals and the pockets of the citizens of the several States.

California taxed bills of lading as steps and symbols in the exercise of interstate trade in *things*, and this court held the taxation invalid as a *restriction* upon commerce; which was in precise and correct contrast with its decision in respect of interstate insurance. Setting aside the question of corporations of one State doing business in another without its consent, it is submitted that Congress cannot

lawfully *prohibit* an individual citizen of one State from insuring the house of, or doing any other kind of business with, a citizen of another, or the transmission, otherwise than in the mails, of the documents relating to the transaction, or even taxing the so doing otherwise than in common with all other such transactions in the United States and without regard to the fact that one party is in one State and the other in another State. A mere contract (certainly in respect of incorporeal and intangible matters), whether lawful or unlawful in the State or States in which the contract is made, will hardly be claimed by anybody to be commerce either State or interstate; and if this be true, it necessarily follows that the transmission of the paper evidences of the existence of such a contract cannot be commerce of any kind; and nobody has yet explained in what way such papers can be in any wise an interference with or restraint upon commerce.

The statute in question does not purport either in title or body to be a provision in respect of commerce. Its obvious and indisputable *motif* is "the suppression" of some particular forms of chance operations in the States, which Congress and some of the States, in their recent condition of temperament, thought to be injurious to good manners in the social progress of the people; a subject with which Congress plainly had no constitutional right to deal otherwise than as determining what class of matter might go through the post office or be carried in its own vessels or vehicles. This legislation began with the post office as purely and exclusively relating to the management of its own mail bags and offices, in respect of which it was manifestly and exclusively supreme. After a while it was thought that the reform by post office means was not rapid enough, and accordingly the law was enlarged to its present dimensions. If the clear prin-

ciples declared and implied in Barber *vs.* Minnesota (1136 U. S., 313,) are to be followed, it is demonstrated that the Act cannot stand as a lawful exercise of the power "to regulate commerce *among* the "several States."

If this attempt to deal with the social conduct and condition of the people of the States be upheld, there is no phase of life in the States any element or incident of which involves the passing of persons or things from one State to another that does not fall within the power of Congress to *control* according to its own discretion. It may make it a crime for any person to cross the line between two States on Sunday, although the two States may have made peaceful entrance lawful on that day, and conversely, it may authorize all business intercourse between two States to be carried on on the Sabbath contrary to the laws of both.

II.—Even if the taking of lottery tickets from one State to another were commerce (which is denied), it is insisted that Congress has no power to *prohibit* it. In considering this point it is not necessary to discuss the question of how far Congress can go in determining what things interstate commerce carriers not chartered by Congress may or may not carry from State to State. The sole essential question here is whether Congress has the rightful power (leaving out of consideration questions pertaining to things intrinsically evil or dangerous) to *prohibit* the transmission of *any* article by *any* means not governmental from one State to another, or the passage of peaceful persons across such boundaries, and thus in so far, to establish non-intercourse. In the Articles of Confederation between the States adopted on the 15th of November, 1777, it was provided:—

"ARTICLE IV. The better to secure and perpetuate "mutual friendship and intercourse among the peo- "ple of the different States in this Union, the free "inhabitants of each of these States, paupers, vaga- "bonds and fugitives from justice excepted, shall be "entitled to all privileges and immunities of free "citizens in the several States; and the people of "each State shall have free ingress and regress to "and from any other State, and shall enjoy therein "all the privileges of trade and commerce, subject "to the same duties, impositions and restrictions as "the inhabitants thereof respectively, provided "that such restrictions shall not extend so far as to "prevent the removal of property imported into any "State, to any other State of which the owner is "an inhabitant; provided also that no imposition, "duties or restriction shall be laid by any State, on "the property of the United States, or either of "them."

On the 7th of August, 1786, a committee of the Continental Congress, having the subject of amending the articles in charge, had reported to the Congress seven articles supplemental to those already existing. One of these was as follows:—

"ART. 14. The United States in congress assem- "bled shall have the sole and exclusive power of "regulating the trade of the states as well with "foreign nations as with each other, and of laying "such prohibitions, and such imposts and duties "upon imports and exports, as may be necessary "for the purpose; provided the citizens of the states "shall in no instance be subjected to pay higher "duties and imposts than those imposed on the "subjects of foreign powers; provided, also, that all "such duties as may be imposed shall be collected "under such regulations as the United States in

"congress assembled shall establish consistent with "the constitutions of the states respectively, and to "accrue to the use of the state in which the same "shall be payable; provided, also, that the legisla- "tive power of the several states shall not be re- "strained from laying embargoes in times of "scarcity; and provided, lastly, that every act of "congress for the above purpose shall have the as- "sent of nine states in congress assembled, and in "in that proportion when there shall be more than "thirteen in the union."

Thus it was distinctly and expressly proposed by the committee that the Congress should have "the "exclusive power of *regulating* the trade of the States "as well with foreign nations as with each other, "and of laying such PROHIBITIONS, and such imposts "and duties upon imports and exports, as may be "necessary for that purpose." The report, contain- ing seven new articles, was discussed for thirteen days, but no final action was taken (Bancroft's Hist. U. S. v. 6, pages 190–1–2). The power to regulate by *prohibition* of trade was provided, together with power over both "imports and *exports*." The Convention of 1787 knew all this and (it may be fairly stated) rejected the words "exclusive," "pro- "hibition" and "exports" and agreed upon the very substance and almost the letter of the rest of the Confederation Congress committee's proposition of 1786; thus making the people of all the States one commercial community as between themselves, subject only to the regulations of Congress for the order and equality of interstate intercourse. "Ex- "clusive" was doubtless omitted because the States were left with powers of exclusion in matters of health, &c.; and "prohibition" was omitted because it was flagrantly repugnant to the fundamental idea of "a more perfect Union" and the very liberty of

untrammeled intercourse of the people of all the States; and the social and civil rights and privileges of the people of each State was made the same in every other.

In respect of foreign intercourse the prohibition powers were quite needless in the commercial clause of the Constitution inasmuch as the States were forbidden to have any relations with foreign powers, and the general Government was given all by other provisions of the Constitution.

Thus the entire scheme of the oneness of the whole people in their intercourse and commerce *among* themselves, and their solid oneness in dealing *with* other nations was made harmonious and complete.

When the present Constitution was adopted in 1787, ten years of experience had shown that in spite of the language of article IV., above quoted, securing free ingress and regress to and from the various States and equal privileges of trade, &c., the great and fundamental purpose of the article in respect of trade had been frustrated, and that the people of some of the States had profited at the expense of the citizens of other States in regard to trade. And it was one of the chief objects of the framers of the Constitution to efface these discriminations and State advantages so that trade and commerce between the several States should be as absolutely untrammeled and equal as it would be between the several counties and other municipal divisions of any one State. It was the adjustment of this subject that formed one of the great difficulties in the Convention and that retarded the ratification of the Constitution for a considerable time; and in regard to one or two of the States the ratification did not take place until 1789, and after the Constitution had taken effect.

The Constitution in the eighth section of the first article defined the powers of Congress in respect of

its legislative powers. It gave the power "to regu-"late commerce *with* foreign nations, and *among* the "several States, and with the Indian tribes."

The second article placed in the hands of the President the power by and with the advice and consent of the Senate to make treaties. By the tenth section of the first article the States were prohibited from having any voice whatever in the foreign affairs of the United States or of themselves. It is submitted, then, in view of the provisions cited and of the history of the period, that the business evils developed under the confederation were those affecting the absolute and untrammeled freedom of intercourse of every kind between the people of the several States, and that it was not the purpose to confer upon Congress in the authority to regulate commerce *among* the several States the power to do the very things and more which the States had done or to diminish the intent and effect of the fourth article of the confederation, but to strengthen it, not by giving Congress the right either to favor one State at the expense of another, or to prevent any sort of intercourse among the States, but to debar every State from in any way interfering with the full liberty of intercourse and trade among the people of all the States.

The phrase "*to regulate*" does not necessarily or usually (if ever) imply the power *to forbid*, except, possibly, as to the *modus* of as distinguished from the *subjects* of interstate commerce. If "to regulate" implies the power to forbid, it necessarily follows that Congress may according to its own discretion determine what classes of persons and what classes of things may or may not pass from one State into another. In such case the clause in question should have read that Congress should have power to allow or forbid interstate intercourse

and commerce. There is no midway of interpretation or limitation. It is not too much to say that had Congress within the first fifty years of our history undertaken to exert any such power there would have been a successful nullification unless this court should have held that the Act was void.

It is not only admitted but affirmed that Congress in dealing with foreign commerce has the right not only to regulate it, but to determine what shall be its subjects, and that its power in this respect is supreme and exclusive, because beyond and above the power to regulate is its unquestioned right (forbidden to the States) to deal with every foreign affair in its sovereign character; and, therefore, the contention that the language of the clause in question must have the same meaning and application as to commerce among the States as that with foreign nations is entirely untenable.

Even if the sovereign and exclusive power in Congress and the President in dealing with foreign relations were left out of view, it is submitted that the word "regulate" may have one meaning as applied to one class of subjects and a different or limited one as applied to another class of subjects. The same word is in all such cases construed according to the general intent. See Maryland *vs.* B. & O. R. R. Co., and many other cases.

If anything is clear in the history of the United States, in its Constitution and in the decisions of its courts, it is that what is known as the police power as controlling the conduct of the citizens of the several States and affecting their social order was not conferred upon Congress excepting so far as it related to places and persons within its exclusive jurisdiction. It would be a perversion of the history and purpose of the Constitution to hold that the representatives of the States undertook in framing

the Constitution to transfer the power in respect of the subjects of internal commerce to the discretion of Congress and thus leave it open to combinations between the representatives from groups of States to obtain advantages over the others by subjective legislation.

It is earnestly believed that the decision of this question, arising in a case in itself of comparatively small importance, is of the greatest concern in considering upon what foundations the local liberties and the stability of our governments of distributed powers rest. The several States, it is thought, are quite competent to determine from time to time what shall be their social order and what conduct of their citizens shall be deemed injurious to their general welfare. If this be true, no interpretation of the language of the Constitution should, if it be possible to avoid it, be allowed to open the door for congressional interference.

In view of the true scope of the word commerce, and in view of the common and only proper meaning of the word regulate, and in the light of the history referred to, it is confidently submitted that the validity of that part of the statute applicable to this case cannot be upheld.

The mass of cases bearing more or less directly upon these questions has been so fully cited and discussed in other briefs that they are not herein (with one or two exceptions) referred to.

GEORGE F. EDMUNDS,
*Of Counsel for the Petitioners.*

As of interest and a convenience to the court the liberty is taken of appending hereto a reprint of the brief of Mr. Carter in the France case, now in the files of the court, which contains an elaborate and valuable discussion of the subject.

G. F. E.

# APPENDIX.

## MR. CARTER'S BRIEF FOR PLAINTIFFS IN ERROR.

## Supreme Court of the United States.

ALBERT L. FRANCE *et al.*

*vs.*

THE UNITED STATES.

Oct. Term, 1896.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

### Statement of Case.

Plaintiffs in error were convicted at the February Term (1896) of the District Court of the United States, within and for the Southern District of Ohio and Western Division, of violating section 5440 of the Revised Statutes of the United States which makes it a criminal offense to conspire to commit an offense against the United States.

The overt act which they were charged with having conspired to commit was the causing to be carried from one State to another, to wit., from Covington, Kentucky to Cincinnati, Ohio, certain "papers, certificates and instruments purporting "to be, and representing the chances, shares and "interests in the prizes which, by lot and chance "might be awarded to persons (to these Grand "Jurors unknown) who might select the numbers "which, by lot and chance, should be included in "the twelve numbers drawn and selected, as here-

"inafter stated, at the drawings of the so-called "Kentucky Lottery, and the so-called Henry Lot- "tery," &c.

Sentences of fine and imprisonment were pronounced upon the convictions and a writ of error was sued out by the defendants. The overt act charged as criminal was alleged to be such because it was a violation, as was charged, of the first section of the act passed March 2, 1895, entitled "An "Act for the suppression of lottery traffic through "national and interstate commerce and the postal "service, subject to the jurisdiction and laws of the "United States, and was as follows:

> "Be it enacted by the Senate and House of "Representatives of the United States of "America in Congress assembled. That any "person who shall cause to be brought within "the United States from abroad, for the pur- "pose of disposing of the same, or deposited "in or carried by the mails of the United "States, or carried from one State to another "in the United States, any paper, certificate, "or instrument purporting to be or represent "a ticket, chance, share or interest in or de- "pendent upon the event of a lottery, so called "gift concert, or similar enterprise, offering "prizes dependent upon lot or chance, or shall "cause any advertisement of such lottery, so- "called gift concert, or similar enterprise, of- "fering prizes dependant upon lot or chance, "to be brought into the United States, or de- "posited in or carried by the mails of the "United States or transferred from one State "to another in the same, shall be punishable in "the first offense by imprisonment for not more "than two years, or by a fine of not more than "one thousand dollars, or both, and in the "second and after offenses by such imprison- "ment only."

The objection was taken in various forms at the trial, by motion to acquit, and, after verdict, by

motion in arrest of judgment, that the first section of the act above mentioned was invalid as being in violation of the Constitution of the United States, and the denial of the motions to acquit and to arrest judgment were assigned as error. It is the purpose of the following brief to support those assignments.

**First Point.**—It is fully sufficient ground for declaring the statute under notice unconstitutional and void to point out the fact apparent and undeniable on the face of the act that Congress, in passing it, *had no other motive or purpose* than to protect the internal morals and welfare of the several States by relieving them from the supposed evils of lottery. If, in *form* and *appearance*, the act is an exercise of the power to regulate commerce, it was a *perversion* and *abuse* of that power.

1. The design of the Constitution of the United States in adopting the bold and novel expedient of admitting two sovereignties to exercise their power in and over the same territory, was that certain *objects* should be accomplished by one of the sovereignties, and certain other and distinct objects, by the other. This was sought to be effected by giving certain legislative powers to Congress in order to effect the one class of objects, and leaving the residue of legislative power in the States to enable them to accomplish the other.

Now it so happens—this is unavoidable—that the exercise of the powers thus committed to Congress may have an effect upon interests which were intended to be left wholly to the States, or that the exercise of powers reserved to the States may have some effect upon interests designed to be entrusted solely to the general government. If in either of the cases supposed the *purpose* of the Legislature was only to carry out the object entrusted to *it*, and the effect of its action upon interests not entrusted to it was incidental only, even if necessary, there is no departure from constitutional action. But if the purpose of the Legislature, while in *form* and *appearance* exercising a power conferred upon, or reserved to itself, was to reach and control an interest wholly entrusted to the other sovereignty, it is a perversion and abuse of power, and just as unconstitutional as if the power itself had not been conferred. In other words, in our American system no powers of legislation are held either by the general or the State governments, for *any and every purpose*, but only to carry out the *ends* for which they were entrusted.

Were the case otherwise the rival sovereignties would be continually encroaching one upon the other, and constitutional law would be in large measure an illusion.

*a.* An apt illustration of this view is found in the case of State laws in relation to immigration, pilotage and quarantine. Undoubtedly these have an incidental, but necessary, effect upon commerce; but if

their real object was only to protect the State against the necessity of supporting paupers, or to facilitate its internal business, or to guard against the introduction of disease, they are valid enactments. If, however, the real *object* was to control commerce in some particular, they are invalid, although, in *form* and *appearance*, they may be an exercise of powers reserved to the States.

In the City of New York *vs.* Miln (11 Pet., 103), a law passed by the Legislature of New York, requiring masters of vessels to give bonds to indemnify the State against the expense of supporting pauper immigrants, was held, though against weighty dissent, to be constitutional. It did not seem to be anything but a provision designed in good faith to protect the State.

In the Passenger Cases (7 How., 283), the validity of another act of the State of New York, as well as one of Massachusetts, which required the payment of a fixed sum for every passenger landed, was challenged, and held to be invalid on the ground, mainly, that such an exaction from every passenger, whether likely to become a charge or not, went beyond the mere exercise of the police power of the State, and imposed a burden upon foreign commerce.

The State of New York thereupon passed another law, designed to obviate this objection, which required the giving of bonds of indemnity only, a thing not found objectionable in the case of the City of New York *vs.* Miln (*supra*); but it allowed the

masters of vessels, if they chose, to escape this burden by paying a fixed charge for each passenger. The money thus paid was to be devoted to the indemnification of the State against the expense of supporting pauper immigrants.

This act was held to be unconstitutional by a unanimous Court; and the ground was that it was plain that the statute was so framed as to make it preferable for the master to pay the money instead of giving the bond, and was thus but a *roundabout* way of exacting the money. Said Mr. Justice MILLER, in giving the opinion of the Court: "In whatever language a statute "may be framed its *purpose* must be "determined by its *natural and reason-* "*able effect*, and it is apparent that the "*object* of this statute, as judged by that "criterion, is to compel the owners of "vessels to pay a sum of money for every "passenger brought by them from a "foreign port."

2. But how are we to know the motive and purpose of Congress, or of the Legislature of a State (for the same rule must be applied to each) in any particular enactment? Are we at liberty to resort to extrinsic evidence of this? It has been held that we are not, but that we are confined to the face of the law itself. If the legislation appears to be in any way *conducive* to an end entrusted to the body enacting it, it is, so far at least, valid; but if it is conducive to no such end, but wholly to an end committed to the rival

sovereignty, it has no validity, for Legislatures, as well as men, must be held to *intend* the necessary consequences of their acts.

In Minnesota *vs.* Barker (136 U. S., 313), it was held that, "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and the presumption that it was enacted in good faith, for the purpose expressed in the title, cannot control the determination of the question whether it is or is not repugnant to the Constitution of the United States."

*a.* One of the most celebrated judgments of Marshall lays down this doctrine. No *express* power had been bestowed upon Congress to create a bank. Whether that body possessed it as an *incident* was the main question. That great Judge discarding the view that any rigorous interpretation was to be placed upon the term "*necessary*," but at the same time insisting that the means resorted to in the attempted execution of an *express* power should be such as might reasonably be supposed to conduce to that end, drew up the formula which should guide the judicial inquiry in language which has never been found to need amendment: "Let the end be "legitimate, let it be within the scope of "the Constitution, and all means which "are appropriate, which are plainly "adapted to that end, which are not pro-"hibited, but consist with the letter and "spirit of the Constitution, are constitu-"tional."

McCulloch *vs.* The State of Maryland, 12 Wheat., 316, 420.

*b.* And the same ground is well illustrated by the case of U. S. *vs.* Fox (95 U. S., 670), involving, not State, but national Legislation. In this case the validity of that provision of the bankrupt law (Sec. 5132 of the R. S.), which made it a penal offense for any person to obtain goods or chattels on credit three months before proceedings in bankruptcy by or against him, on the false pretense of dealing in the ordinary course of trade, was challenged. It was held invalid, because there was in such an act *no relation* to the execution of the power committed to Congress to establish a system of bankruptcy. Says Mr. Justice FIELD, in giving the opinion of the Court: "Any act committed with a view of evading the legislation of Congress passed in the execution of any of its powers * * * may properly be made an offense against the United States. But an act committed within a State, whether for a good or a bad purpose, or whether with an honest or a criminal intent, cannot be made an offense against the United States, unless it have *some relation* to the execution of a power of Congress, or to some matter within the jurisdiction of the United States." (p. 672.) An exact syllabus of this decision would be *that Congress cannot make any act a crime, unless it is in some manner "necessary or proper," in the execution of its own powers to do so.*

The case of the United States *vs.* Reese (92 U. S., 214) is also illustrative. The fifteenth amendment provided that the right

of the citizens of the United States to vote should not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude; and power was conferred upon Congress to enforce this article by "appropriate legislation." Congress enacted a law, which provided, in substance, that offers by a voter to perform any prerequisites to the right to vote should be deemed, in case of wrongful refusal by election officers to accept the offer, a performance; and the subsequent refusal to accept a vote was made a penal offense. This was held not to be "appropriate legislation;" because it went further than was necessary or proper to carry out the power committed to Congress, and made acts offenses which might not have denied the suffrage on the ground of race, color, or previous condition of servitude.

The same method of judicial inquiry was approved and followed in Dent *vs.* West Virginia (129 U. S., 114). The question arose whether the Legislature of that State had the authority to prescribe certain qualifications for physicians. The right of the State to protect society by requiring some qualification was regarded by the Court as unquestionable; but it did not doubt that this right was subject to limitations, and viewed the question of the constitutionality of any particular legislation as turning upon the inquiry whether it was *appropriate* to the end. Said Mr. Justice FIELD, in giving the opinion of the Court: "The "nature and extent of the qualifications "required must depend primarily upon

"the judgment of the State as to their "necessity. If they are appropriate to "the calling or profession, and attainable "by reasonable study or application, no "objection to their validity can be raised "because of their stringency or difficulty. "*It is only when they have no relation to* "*such calling or profession*, or are un- "attainable by such reasonable study and "application, that they can operate to de- "prive one of his right to pursue a lawful "vocation."

And the case of Cummings *vs.* The State of Missouri (4 Wall., 277), is also in point. In that case the validity of provisions of the Constitution of Missouri, exacting a rigid oath of loyalty as a *qualification* for voting, holding office, &c., was challenged. The Court did not question the right of the State to exact *qualifications* for the discharge of public functions, but, looking into the oath in question, it found it to be not really of the nature of a qualification, and therefore condemned it. Said Mr. Justice FIELD, in giving the opinion of the Court: "Qualifications relate to "the fitness or capacity of the party for a "particular pursuit or profession." And, after discussing some of the acts which the party was required to swear he had not been guilty of, he added: "It is manifest "upon the simple statement of many of "the acts, and of the professions and pur- "suits, *that there is no such relation be-* "*tween them* as to render a denial of a "commission of the acts at all *appropriate* "as a condition of allowing the exercise

"of the professions and pursuits" (pp. 319, 320).

And in *ex parte* Garland (4 Wall., 333), an Act of Congress of a similar character was declared unconstitutional on the same grounds.

c. And to the like effect also are the cases arising upon the municipal ordinances of San Francisco in relation to the carrying on of laundries. In the cases of Barber *vs.* Connolly (113 U. S., 27), and Soon Hing *vs.* Crowley (*Ib.*, 703), ordinances forbidding work to be done in laundries in certain places, from ten at night to six in the morning, were held unobjectionable, for the reason that they appeared, *on the face*, to be not unreasonable police regulations for the protection of the good order and peace of the community. It may have been that the real object was to disfavor the Chinese, but the Court would not indulge this supposition when nothing upon the face of the ordinance warranted it. But when a different ordinance was framed, forbidding the carrying on of laundries in San Francisco without the consent of the supervisors, and its validity was challenged, it was promptly condemned, on the ground that it did not provide for anything in the nature of *regulation*, but gave an *arbitrary* authority to the supervisors to grant or deny what should be a common privilege (Yick Ho *vs.* Hopkins, 118 U. S., 356).

*d.* So also in those cases where, under State laws, wharfage is exacted, this Court has made the question of their validity turn upon whether they were *really intended* to fix a reasonable compensation for that facility, or to impose an exaction upon commerce. Said Mr. Justice MILLER, in giving the opinion of the Court: "In "all cases of this kind it has been repeat- "edly held that, when the question is "raised whether the State statute is a "just exercise of State power, *or is in-* "*tended as a roundabout means to invade* "*the domain of Federal authority*, this "Court will look into the operation and "effect of the act to discern its purpose." (Morgan *vs.* Louisiana, 118 U. S., 455, 462. See also Ouachita Co. *vs.* Aiken, 121 U. S., 488.)

*e.* The numerous cases upon the validity of State laws imposing license fees upon traders, drummers, agents, etc., furnish other illustrations of the same doctrine.

*f.* We close these citations with an extract from a recent decision of this Court, already cited, which presents a striking instance of the necessity which this Court has recognized of scrutinizing the *purpose* of a law with a view of determining whether it was designed to carry out an acknowledged power of the legislature, or to accomplish an end which was beyond its powers. In 1889 the State of Minnesota had passed a law providing for the inspec-

tion of meats before the animals were slaughtered, and its validity was attacked on the ground that it tended, and was designed, to impose a burden upon interstate commerce. It has always been conceded that the passage of laws providing for the inspection of food, &c., was clearly within the powers of State legislatures, and although there was nothing upon the face of this statute which in terms operated upon interstate commerce, this Court did not hesitate to say that it was designed to operate upon that commerce, and was consequently invalid (Minnesota *vs.* Barber, 136 U. S., 313.)

Mr. Justice HARLAN in giving the opinion of the Court, after referring to prior cases, which had been hereinbefore cited, employed very happily conceived language:

"Upon the authority of those cases, and "others that could be cited, it is our duty "to inquire, in respect to the statute "before us, *not only whether there is a* "*real and substantial relation between* "*its avowed objects and* the means devised "for attaining those objects, but whether "by its necessary or natural operation "it impairs or destroys rights secured "by the Constitution of the United States" (p. 320).

*g.* It would, of course, as already intimated, be entirely repugnant to the spirit of the Constitution, and to the equality of the States and the general government in their respective spheres of sovereign action, if

the same rule were not applied in determining the validity of a congressional enactment. The same rule has always been applied to each case.

3. Proceeding to examine this statute in the light of the above doctrines, it is immediately manifest that if it be, in *form* and *appearance* even, an exercise of the power to regulate commerce, *that* thing is no part of its real purpose; but that its real purpose and motive are to usurp the police powers of the States over internal morals.

*a.* It is absolutely no part of the motive or purpose to protect or benefit in any way, either foreign or interstate commerce. The mere carrying of lottery documents from one State to another, or bringing them from abroad, has no bearing or effect whatever upon commerce. It relieves it from no burden, furnishes no additional motive for it, facilitates it in no way, and commerce both foreign and interstate would proceed after its enactment precisely as before.

*b.* It accomplishes precisely what a similar statute enacted by the several States would accomplish and no more. Any State would have indisputable power to enact both that no lottery documents should be brought into it, or carried out of it, which is all that this statute enacts.

*c.* Legislation upon commerce, whether foreign or interstate, must relate and be confined to either (1) *the highways of such commerce*, that is, either the sea or the navigable waters of the country, or the public land highways, such as the roads and railways when used for interstate transportation; or (2), the *instrumentalities* of such commerce, such as ships or land vehicles (when used in interstate commerce); or (3), the *agents* of such commerce, such as carriers when engaged in carrying it on; or (4), the *subjects* of such commerce, such as articles of trade and merchandise when set apart and destined for foreign or interstate transportation, or their documentary substitutes.

*Commercial intercourse*, which is the broadest definition of commerce ever laid down, embraces the above-enumerated matters and them alone. This act neither relates to or affects either of them. It is aimed at no ship, no highway, no carrier, no article that is bought and sold.

*d.* If a doubt could be started as to any one of the above particulars it would be as to an article of trade which could be bought and sold, and it might be suggested that a lottery ticket could be bought and sold; but it is needless to consider this, for the provisions of the act extend even to any *advertisement*, that is, any written or printed information of a lottery.

*e.* It forbids the *mere* carriage from one

State to another of any of the documents referred to in it, not by any ship or land conveyance, or over any highway of commerce; but in any way whatever, so that if a man should carry one of the papers in his pocket through the fields across the boundary line between two States he would incur the penalties of the act. Nor, so far as interstate transmission is concerned, is it requisite that the papers should be carried for the purpose of disposing of them to others; but the penalty would be incurred if a man should carry them pursuant to instructions to put them in the fire on the other side of the line.

**Second Point.**—But the statute is unconstitutional and invalid, irrespective of the purpose and motive with which it was passed. It is not even in *form* and *appearance* an exercise of the power to regulate commerce; but of the police power reserved to the States of protecting their interior morals and welfare.

1. It will not be pretended that there is anything in the circumstance that papers or documents relate, in some manner, to *lotteries*, which gives to them a *commercial* character, so as to enable Congress to prohibit the carriage of them from one State to another, when it would not, or might not, have the power to prohibit such carriage of other things. If Congress has the right to

prohibit such carriage of lottery documents, it can only be because it has the power to prohibit such carriage of any tangible thing whatever. And inasmuch as the prohibition is not limited to carriage on any navigable waters of the United States, or any public *highway* of commerce, nor by any ship, car, or other vehicle employed as an *instrumentality* of commerce, nor by any carrier or other *agent* of commerce, nor for any *purpose* such as *sale*, or other disposition, the power assumed to be exercised by Congress in enacting the law is a power to prohibit the carriage from one State to another of any tangible thing in any manner whatever, over highways, or through fields, and for any purpose whatever. If it be said that Congress would not have the power to prohibit such carriage of *innocent* things, for the reason that it would be a deprivation of fundamental rights, the above statement may be qualified by adding to the word "prohibit" the qualification of "or to regulate" as by requiring a license, or imposing some other condition.

In short this legislation assumes that *the mere carriage in any manner, for any purpose, of any tangible thing across the boundary line separating two States is commerce!* And unless this precise proposition can be made out the statute cannot be defended.

*a.* According to this if a man going from one State to another, happened to take with him in a trunk, bag or other receptacle, or even in his pocket any tangible things

documentary or other, this would be commerce in such things, and whether he went by rail, wagon, or on foot, or over a highway, or through fields.

*b.* If a man removed his home from one State to another, even though the distance were less than a mile, and took his household goods and chattels with him, it would *be commerce* in those things.

*c.* If *persons* could be regarded, as they have sometimes been thought susceptible of being regarded, as imports and exports, the visit of a young man to his home in another State to spend Thanksgiving would be *commerce.*

*d.* It may be argued that "commerce" has been defined as "*intercourse,*" and that if this be correct any communication between different states is interstate commerce. This definition has, indeed, been frequently given, and its author was Marshall, but he did not commit the absurdity of saying that *all* intercourse was commerce. He said: "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the *commercial* intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse." (Gibbons *vs.* Ogden, 9 Wheat., 1); and, while this definition has been many times adopted, it has always been with the qualification limiting it to

*commercial* intercourse. Surely it does not embrace family or social intercourse.

*c.* It might be asked whether if one man hired another to transport goods for him from one State to another, it would not be commerce, even though the transportation was by a private vehicle and through the fields. Undoubtedly it would be commerce if the purpose were a *commercial* one, that is to say, if it were connected with the purchase, sale or exchange of them, and not otherwise. But, however, this might be with *articles* of commerce, it certainly would not be with such things as lottery documents which are not articles of commerce. What articles of commerce are has been determined by this Court. They are *such* things as have a value in themselves and are bought and sold in the way of trade. Such things as policies of insurance whether fire or marine are not articles of commerce; and still less can lottery documents advertisements, &c., be such.

Paul *vs.* Virginia, 8 Wall., 168, 183.
Hooker *vs.* California, 155 U. S., 648.

2. There is nothing in the decision *in re* Rapier (143 U. S., 110), at all conflicting with anything above argued. In that case the question was as to the constitutionality of a law excluding lottery matter from the *mails*. The law acted upon a physical instrumentality within the exclusive legislative power

of the general government, and it was held that the States in surrendering to the United States the exclusive control of the mails surrendered it in as perfect a manner as they, before the constitution was adopted, possessed it; and that as, prior to the surrender, the States could have exercised the challenged power, and could not afterwards, the general government could exercise it.

But in relation to the present statute there has been no such surrender, and the State legislatures may unquestionably enact just such a law. They would not, however, prefix such a title to it.

**Third Point.**—But the statute in question is invalid, not only for the reason that none of the powers conferred upon Congress were sufficient to authorize it, but also because Congress was, by an *express restriction upon the exercise of those powers*, prohibited from making such a law. It assumes the power to declare what printed or written matter shall be carried from one State to another, not only by the mails, *but in any way or manner whatsoever*. It is, therefore, a law "abridging the freedom of the press" within the meaning of the First Amendment.

**I.**—It is important to keep in mind throughout this discussion, that the constitutional safeguard thus invoked is not so much a limitation

upon the *express powers* enumerated and granted to Congress, as it is a restriction upon the *legislative means* to be employed in the exercise of those powers. Speaking with precision, it is a restriction upon the *incidental* powers which Congress may exercise in carrying out its express powers. When read, as it should be, as a part of the Constitution, it is as if the Seventeenth clause of the Eighth section of Art. I. contained these words. The Congress shall have power "To "make all laws which shall be necessary and "proper for carrying into execution the fore-"going powers, and all other powers vested by "this Constitution in the Government of the "United States, or in any department or officer "thereof; *provided, however,* that it shall "make no law abridging the freedom of the "press."

The argument, therefore, upon which we are now entering is to the effect, that if the power of thus prohibiting the circulation of printed and written matter be regarded as incidental to the power to regulate commerce, Congress is prohibited by the First Amendment from exercising it.

II.—Any discussion of the question, whether an enactment of Congress abridges the "Liberty of the Press," should properly start with a clear statement of what that phrase imports, or rather what it imported at the time of the adoption of the Federal Constitution, for it was the particular Liberty of the Press which then existed, which was, and is, protected by the constitutional safeguard.

Our proposition is, that this Liberty of the Press *imported the liberty of free discussion in print, without any restraint, save that which was imposed by the law of libel as it then existed in the jurisprudence of England and her American Colonies.*

1. The primary meaning of *liberty* is *exemption from restraint;* and absolute liberty imports entire freedom in the individual to do whatever he pleases. Such absolute liberty does not exist in any form of society, either civilized or barbarous. The very existence together of more than one individual brings with it some restraint, either of force or fear.

   The actual Liberty of the Press, which the constitutional safeguard secured, was the liberty of discussion in print, qualified and limited by those restraints which society had ascertained and declared to be necessary to social peace and order.

2. The inquiry, then, becomes what were the restraints which, at the period in question, could be imposed upon the liberty of free discussion in print. These cannot be justly apprehended without some brief examination into the nature, the importance, and the history of free discussion.

   It will at once become manifest that we are dealing with a subject which, so far as concerns free government, transcends every other in importance.

   *a.* In most human societies, if not in every

one, there are found two opposing tendencies; one on the part of those in power to preserve the existing state of things, which is to preserve their own supremacy; the other on the part of those who are governed, to reform and improve as they think, the existing condition. It matters not whether the government is absolutely despotic, or in the hands of an aristocracy, or in those of a majority, as in a republic. The opposing tendencies, though operating with different degrees of activity, are, in each case, present.

c. Government is but the exercise of *power*. And this is true whether the power is arbitrary and despotic, or limited by custom and tradition, or, by constitutional forms, to the enactment and execution of regular laws. Its essential nature is *restraint*.

d. Every despot identifies government with himself; and views any attack upon himself as an assault upon the State. The *disposition* is the same in the freeest of States. Those in office, and the majority which they represent, are apt to think that the safety of the State depends upon their retention of the sovereign power. It is less apparent, but really true, that in republics, as well as despotisms, all attempts to undermine the authority of the governors are viewed by them as offenses, and will be met with as great an exercise of repression, either arbitrarily or by law, as those in authority may think it safe to ex-

ercise. The spectacle of a party in a republic seeking by an exercise of the power it has gained to intrench itself in its position is entirely analogous to the arbitrary persecution by a despot of his supposed enemies.

*e.* All government rests upon *opinion.* This is as true of despotisms as of republics; although the former are less sensitive to opinion; and it is, if not theoretically acknowledged, tacitly felt, by all governments. And hence, all governments, whether temporal or spiritual, have viewed *free discussion*, which creates, concentrates and consolidates opinion, as a menace to their existence, and have conscientiously regarded it as a duty to repress it.

*f.* The conflicts thus engendered have resulted in the most bitter persecutions and the most devastating wars; all the more bitter and devastating from the fact that the combatants on each side have been equally sincere and equally confident that the salvation of society depended upon their success. The overthrow of one set of rulers has been succeeded by the elevation of another equally intolerant, and equally ready to employ the same arts of repression which had been exerted against themselves.

*g.* But for some centuries there have not been wanting enlightened minds who have perceived that such an exercise of the

powers of society was not consistent with the advancement of truth, either in morals, religion or government; and that some other solution must be found for the question how far the right of free discussion should be limited and restrained.

That solution was found a century and more ago by Great Britain, in the thorough establishment of the doctrine of the Liberty of the Press, as explained in the proposition stated under subdivision II of the Third Point of this brief, and it has been accepted by the States and Colonies, of which she has been the parent. It has been acknowledged and accepted to some imperfect extent by other European nations, but can hardly be said to have become incorporated into the fundamental law in any of them. The extent to which this solution is acted upon by any State, marks the degree of its freedom and civilization, and its capacity for progress.

**III.**—Liberty of the Press, as thus understood was, as all great achievements are, the fruit of a long struggle, in which there may be discerned two successive principal stages, in each of which the principle received a distinct enlargement and more exact definition. It is of much importance, to a just apprehension of the principle, that this gradual development should be studied.

1. The first stage of this development was

marked by the abrogation of all *censorship* of the press, which left men free to print and publish their opinions without *previous* restraint.

*a.* The application of the art of printing furnished a new and prodigious instrumentality for creating, consolidating and disseminating *opinion;* and consequently for attacking government, religion, and all establishments resting upon opinion. The disposition to employ repressive power, always natural to those who are the custodians of it, was everywhere yielded to, and the most effective form of repression—that which acted *beforehand*, and directly *prevented* the obnoxious practice—was resorted to, not only under despotic governments, but even in England.

This authority was asserted under the form of a *censorship*, or *previous* restraint, and permitted nothing to be printed except such matter as had been *allowed* by the censor, and made provision for the summary search, seizure and destruction of unlicensed works, and of the presses, material, etc., employed in printing them.

*b.* This power seems originally to have been exercised by the Crown itself; and in two forms—*first*, by the prohibition of printing anything not allowed by the licensor; and —*second*, by vesting the exclusive privilege of printing, even under these restrictions, in a few favored grantees, the two Universities, and the Printers' and Stationers' Company

of London. At a subsequent period it was lodged in a body every way fited for such a purpose—the Star Chamber. It was asserted by the Long Parliament during the vacancy on the Throne, and, after the Restoration, was again vested in the Crown by Acts of Parliament.

For an account of the origin and nature of the censorship the following authorities may be consulted:

May, Con. Hist. of England (N. Y., 1874,) vol. 2, Art. IX., pp., 102–106.

Entick *vs.* Carrington, 19 How. St. Tr., 1029. 13 & 14 Car. II., c. 33.

Scarlett, *arg.* Rex. *vs.* Burdett, Lord Abinger's Mem., p. 297.

Erskine's speech for Thomas Carnan (Speeches, Lond. 1810, vol. 1, p. 38).

Dicey's Law of the Constitution (Lond. 1886, p. 274.)

Odgers' Libel and Slander, (2 Lond. Ed., 10.)

Paterson, Liberty of Press, Speech & Worship, 38–61.

c. A prerogative of this nature, involving as it did the destruction of property and the deprivation of personal rights without previous accusation, trial and conviction, committing the determination of the most important questions to the arbitrary decision of a man who would necessarily be but the tool of those who appointed him, was wholly inconsistent with the fundamental principles of English liberty then beginning to assert themselves. It was inevitable that sooner or later it would be deliberately challenged and overthrown.

An order of the Long Parliament in 1648 drew from John Milton his "Areopagitica," in which he defended the liberty of unlicensed printing with all the power and splendor of his genius.

*d.* Limited in their operation to the period prescribed in them, it was necessary to the continuance of the restrictive policy that the censorship laws should be from time to time renewed, and the growing antipathy to them naturally expressed itself in opposition to the attempts at renewal.

A select committee of the House of Commons was appointed in 1695 to report what temporary acts then about to expire should be renewed; and it reported in favor, along with others, of the act creating a censorship of the press; but when the vote of the House was taken on this recommendation it was decided in the negative. The Lords sent back the bill, containing other temporary acts, with an amendment embracing the one thus rejected; but the Commons refused to concur, and, upon a conference, the managers on the part of the Commons delivered to the Lords a weighty report condemning the whole system of censorship, and the Lords yielded.

This report dwelt more upon the incidental evils of the system of licensing, such as jobs, exactions, seizures, domiciliary visits, &c., than upon the general advantages of free discussion, and in this the historian Macaulay finds matter to gratify his love of paradox.

"Such," says he, "were the arguments which did what Milton's Areopagitica had failed to do." But it would be a mistake to suppose that that immortal plea for the freedom of thought, speech and the press had then passed from the minds of men.

This action of Parliament is declared by the same historian to have "done more for liberty and civilization than the Great Charter, or the Bill of rights." (Macaulay's Works, New York, 1866, vol. 4, pp. 124–126.) That it was this action which constitutes the *beginning* of the era of the Liberty of the Press in England is everywhere agreed.

2. It was, however, but the beginning. Free discussion may be restrained as well by *subsequent punishment*, as by *previous restraint*. It is, in either case, only *the fear of punishment* which operates to prevent men from publishing what they may have a desire to publish. And this fear may be created as well by annexing penalties to the *publication* of writings in some manner *specified* and *described*, as by forbidding the publication of *unlicensed* writings under similar penalties.

The *censorship* had fallen almost upon the first deliberate attack. It was far otherwise in respect to the question of *subsequent punishment*.

It was agreed upon all hands that no man could be punished for publishing any writing unless it was what the common law as it then stood denounced as *libellous*. But the

momentous question arose in whom was the power lodged of ultimately determining whether a publication be libellous. If it were reposed in a select magistracy created by, and dependent upon, the arm of power a restraint might be re-established quite as tyrannical and effective as the censorship. If it were committed to ordinary juries taken from the body of the people and exercised under all the safeguards of a regular jury trial, the largest possible measure of freedom would be secured. The advocates of privilege and prerogative—the *possessors* of power—naturally took the first position. The advocates of freedom asserted the second. After a memorable contest which "shook the foundations of Westminster Hall," and was carried into Parliament, the latter obtained a complete and final triumph. *And this marks the second stage in the struggle* for the liberty of the press.

May's Const. Hist. of England, Vol. 2, pp. 108, 122.

*a*. There were two ways in which after the fall of the censorship a restraint more or less effective might have been asserted. One was by a legislative change in the common law of libel. Parliament might have enacted that any publication calling in question the powers of magistrates or other public officers, or the authority of the established church, or advocating certain designated views upon morals or government, should be deemed libels. Such laws would theoretically, at least, and, in most cases, in fact, have required

juries to find publications to be libellous which would before have been held innocent. Such attempts seem never to have been made in the British Parliament. Probably, at no period subsequent to the revolution would they have been successful.

The other method was by asserting that the question whether a paper is libellous is a question of *law* to be determined by the Court, whose instruction the jury is bound to accept, confining itself to the question of *publication* alone. This is substantially clothing the Judges with the same power which, as above indicated, the Legislature might assert.

*b.* As already indicated the partisans of power and restraint accepted the latter method. There were divers reasons for this preference. It would not arouse the opposition which might be excited by attempts to *change* the law. The decisions of the Courts are not enactments, but declarations of what the law *is*. Moreover, there were plausible grounds upon which such a view might be defended. The construction and import of writings is, in general, a question of law. And at this period, although the precedents were not uniform, *there were some* at least, if not a majority, in accordance with the view. And finally this doctrine did not, on its face, *appear* to assail the liberty of the press. Those who advocated it could still agree with their opponents, that a man might publish with impunity anything which at common law was not a libel.

c. But the whole question of the freedom of the press, was wrapped up in the question whether the ultimate decision be lodged with the Judge or the jury. If with the former, that freedom would be under the control of a fixed magistracy necessarily inclined to support the pretenses of power, and the same reasons which guided the action of the censorship, would be made the grounds of judicial determination. This truth became well illustrated in the course of the struggle with which we are dealing. The censorship act (13 and 14, Car. II., c. 33) was from time to time renewed down to 1679, when it was permitted temporarily to expire. The support of the pretenses of the Crown was then devolved upon the Judges; and how thoroughly they were prepared to render that service may be seen by the doctrine declared by the twelve Judges, Scroggs, C. J., at their head, in Carr's case, 1680 (7 St. Tr, 929), that it was criminal at common law to write on the subject of government, whether in praise or censure; "for no man has a right to say *anything* of government!" (See also, Entick *vs.* Carrington, 19 How. St. Tr., 1069–1071.) But if the decision were lodged with the jury, it would reflect the sentiment of the public, and consequently secure to the press that real freedom so essential in enlightened government.

d. That the real issue was of this nature was not, at first, distinctly perceived. The Judges naturally assumed the office of in-

structing juries what were libels and what were not, without, however, at first, insisting that it was not competent for the jury to pass upon that question themselves; but, finally, cases arising where it was feared that the juries might acquit contrary to the opinions of the Judges, the latter came to insist that the jury were concerned alone with the fact of publication and the truth of the innuendoes, and must leave the question of the character of the publication, as criminal or innocent, to the Court.

It was at once perceived by the liberal statesmen and lawyers of the time that this position, if established, rendered the liberty of the press an empty sound, and that the old doctrines of the censorship would be renewed under another form. Under the powerful influence of Lord Mansfield the twelve Judges were brought to something like an agreement in favor of this menacing doctrine; but the boldest spirits of the English Bar supported by the most distinguished statesmen of the time, Lords Chatham, Camden (himself an illustrious lawyer), Burke, Fox, Sheridan and others denounced it as an outrageous perversion of the ancient law of the realm.

c. The champion *of the doctrine* of restraint, Lord Mansfield, pronounced the first deliberate opinion on the question in the case of The King *vs.* Woodfull, in 1770 (20 St. Tr., 895). The trial had been before him, and in his charge to the jury he had de-

livered to them his opinion of the liberty of the press as follows: "As for the liberty "of the press I will tell you what that is; "the liberty of the press is that a man may "print what he pleases without a license; "as long as it remains so, the liberty of "the press is not restrained"! He then told the jury that the question of libel or not libel was not for them, and this charge was held correct by a subsequent decision of the Court on a motion for a new trial. But, soon after the trial, and before this decision had been delivered, the public mind had taken alarm at these doctrines and had found expression in a motion by Sergeant Glyn in the House of Commons for a committee to enquire into the proceedings. Upon this motion, in the course of a long debate, the Chief Justice was severely censured by the mover, as also by Dunning and Burke, and defended by the Attorney-General and by Thurlow, as well as by Charles Fox, who had not then arrayed himself on the popular side (Part First, 1211–1302).

He was also assailed in the House of Lords by Lords Chatham and Camden. After the delivery of his judgment in the King's Bench, he was formally attacked by the latter and challenged to debate the question. He at first seemed to accept the challenge, but finally declined and remained silent, to his great discredit, as Lord Campbell informs us.

Lives of the Chief Justices (New York), Vol. 4, pp. 387–393, 485.

*f.* The judgment in The King *vs.* Woodfull had no effect in settling the question. It was again revived and made the subject of a great and memorable debate in 1784, in the case of the King *vs.* The Dean of St. Asaph, in which Erskine made the immortal argument which will forever stand as the finest union of perfect logic and fitting eloquence in the language. Drawing a just distinction between private and public libels, he asserted concerning the latter:

(1.) That the question of guilty or not guilty on an indictment could not in general be determined without determining the *intent* with which the writing was published; and that this had nothing in it resembling a question of *law*, but was a pure question of *fact*.

(2.) He exposed with pitiless severity the pretense that a verdict of guilty on an indictment for a libel, differing from a like verdict in other criminal cases, proved only the fact of publication, and left the question of guilt or innocence wholly undecided. He put it to the Court to answer these questions. If the jury have nothing to do with the question of libel or no libel, why have the Judges for a hundred years been so sedulous to expound to them that the publication was a libel? Why is a verdict of *guilty* asked for and given, if the question of guilt is withdrawn? How is is that where the indictment is laid upon a part of a writing or book, the jury is permitted to take into consideration the whole writing or book?

(3.) And he put it with unanswerable force that inasmuch as sentence and execution might immediately follow a verdict of guilty, the defendant would be punished without a trial, if, as Lord Mansfield had declared, the verdict of guilty left the question of guilt or innocence open.

(4.) He showed that the authorities, even in the King's Bench, had been far more uniform, and that the doctrine for which he contended had the support of the Judges in the great case of the seven Bishops, and of the commanding authority of Holt in Hutchin's case.

(Erskine's Speeches, Ridgeway's Ed., Lond., 1810, Vol. 1, p. 264 *et seq.*

The above are but a few among a multitude of arguments and illustrations with which the great advocate overwhelmed his adversaries.

The spectacle exhibited by Lord Mansfield in affirming the ruling of Butler, J., against the argument of Erskine was most pitiful (3 Term Rep., 428 n.) He made no attempt to answer it. He could make none with any show of success. He was obliged to admit that his doctrine of a verdict of guilty on a general plea of not guily, left the question of guilt undetermined and was equivalent to a special verdict in other cases, was an anomaly in English law, and fell back for his support of his pretended anomaly, not upon any considered decision founded upon deliberate argument, but upon what he alleged to be the *understanding* of the Bench and Bar. He even asserted that this had been the general un-

derstanding among the leaders of the popular party, and in proof of his assertion, imputed to Pulteney the following lines as having been written by him in a ballad:

"For twelve honest men have decided the cause,
Who are judges of fact though not judges of law."

In truth the lines in Pulteney's ballad, were precisely the reverse. They ran:

"For twelve honest men have determined the cause,
Who are judges alike of the facts and the laws."

(Lord Campbell's Lives of the Chief Justices, New York, Vol. 3, p. 450.)

*f.* This great argument of Erskine was printed at the time and widely circulated, and sank deeply into the public mind. It was never answered; and it may safely be said that the general judgment of the profession ever since has been that Lord Mansfield's doctrine was a perversion, and not a declaration, of the English law. Lord Campbell pronounces it to have been "based upon a transparent fallacy" (Lives of the Chief Justices, New York, Vol. 4, p. 450). The conviction of the public mind, well established long before, was finally made thoroughly effectual in 1792 by the passage of the bill introduced by Mr. Fox, who had then become a convert to popular principles, which enacted in effect that in public prosecutions, while the Judges might declare their opinions as

to whether a paper was a libel, the jury should have the right to pass upon the question in giving the verdict. This act purported to be, what it was in fact, simply declaratory of the pre-existing law. It was passed unanimously in the House of Commons, and by a large majority in the Lords.

*g.* The doctrine rests upon impregnable foundations in reason. When any charge is made against an *individual*, a fact is asserted, the *truth* of which may be tried, and, unless justified, or shown to be privileged, malice, and consequently guilt, must be imputed to the defendant. But what is called a *public* or *seditious* libel is not a charge against any *person*, but the assertion of something supposed to be detrimental to correct principles of morality or government. It is, therefore, an attack upon *opinions*, and can be nothing but *opinion* itself. And the question whether such publications are true or false, can never be matter of *law*, except under some government which undertakes to establish *by law* what truth is in respect to morality or government, and to forbid the expression of opposite opinions.

The modes in which men may express their opinions are as various as the natures of different individuals, and it is impossible to define bounds or limitations within which the expression may be confined.

But it is not doubted that publications may be made with *intent* to overthrow by unlawful means the institutions of govern-

ment. These cannot be defended as expressions of opinion. They are not aimed to produce conviction. Obscene books and pictures, writings teaching what are universally acknowledged to be crimes, are not discussion and debate, and may doubtless be condemned, and the authors and publisher of them punished. There is a universal consensus to the point that social peace and order by means of government shall be preserved. This is necessary even to free discussion.

The question, therefore, must always be whether any writing charged to be libellous is an honest, *bonæ fide* attempt to express opinions really entertained, or a dishonest effort to inculcate vice and crime. Manifestly this must always be a question of *fact*, and of fact alone. The writing may be, and usually is, important *evidence* of the fact, but cannot supersede other evidence. The circumstances under which it was written,—the other parts of the paper not charged as libellous—the character and conduct of the writer—all these constitute information which may be laid before the jury to enable it to ascertain the vital and material fact of *intent*.

*h.* It follows as a corollary from the foregoing that there cannot be any further definition of a public or seditious libel, than that it is a publication intended to be hostile to government and to bring it into contempt. This may be said to be universally admitted, both by lawyers and statesmen. It has never been otherwise defined.

Lord Lansdowne, in H. L., 41 Parl. Deb., 7–15.

Protest of the Peers, *Ibid.*, 747.

Brougham's Contributions (London and Glasgow, 1856, vol. 3, p. 157).

Hamilton. (Crosswell's Case, Works, New York, 1886, vol. 7, pp. 334, 343).

The impossibility of definition is well stated by Sir James Macintosh: "Those "who slowly built up the fabric of our "laws never attempted anything so ab- "surd as to define by any precise rule "the obscure and shifting boundaries "which divide libel from history or free "discussion. It is a subject which, from "its nature, admits neither rules nor defi- "nitions. The same words may be per- "fectly innocent in one case and most "mischievous and libellous in another. "A change of circumstances, often appar- "ently slight, is sufficient to make the "whole difference. These changes (which "may be as numerous as the variety of hu- "man intentions and conditions) can never "be foreseen or comprehended under any "legal definitions, and the framers of our "law have never attempted to subject them "to such definitions."

*i.* If the truth of doctrines may be evidenced by their salutary effects, no further defense of those above stated would be needed than a simple reference to history.

It is a melancholy task to peruse the criminal records of England while the doctrine of Lord Mansfield was enforced, and observed the chequered spectacle—a host of prosecutions instituted, often for the expression of the most innocent, or even laudable, opinions—verdicts extorted from juries against their will, and at other times juries defying the instructions of Courts. But since the passage of the Libel Act of Mr. Fox the scene is entirely changed. Prosecutions for public libel are extremely rare; and the notion that the existence of government or morality can be seriously threatened by any publication of mere opinions has been dismissed as a silly delusion.

3. The preceding discussion has made it clear that for more than twenty years immediately preceding the adoption of the Federal Constitution there were two rival views concerning the liberty of the press in England, one being that declared by Lord Mansfield, namely, that "a man may print what he pleases without a license," but at the risk of having what he prints declared by a fixed magistracy to be a libel and of being subjected to punishment therefor without the privilege of defending his innocence before a jury; and the other, *that which vouchsafed* to him this privilege, and which was well stated by Lord Kenyon as follows: "After "all, the truth of the matter, as to the lib- "erty of the press, is very simple when "stripped of the ornaments of speech, and a

"man of plain common sense may easily un-
"derstand it. It is neither more nor less
"than this: that a man may publish any-
"thing which twelve of his countrymen
"think is not blamable, but that he ought
"to be punished if he publishes what is blam-
"able. This, in plain common sense, is the
"substance of all that has been said upon
"subject." (Rex *vs.* Cuthill, 27 St. Tr., 675). If, as we have endeavored to show, Mr. Fox's act was but declaratory of the pre-existing law, it is quite immaterial that the above definition was given some two years after the passage of that act.

The important question is, in which sense the term "Liberty of the Press" was employed in the First Amendment. The preceding discussion seems to relieve that question of doubt. How can we doubt that the framers of the Constitution themselves devoted to free principles of government, detesting the doctrines of arbitrary power, with the spectacle then actually before their eyes of the conflict going on in England between these rival views—a struggle in which all who had been their friends were upon the popular side—a struggle substantially finished by the triumph of that side—intended by the phrase "Liberty of the Press," precisely that liberty which was not only guarded by exemption from previous restraint, but defended by the safeguard of a jury trial?

4. But such a question can hardly be raised since the decision of this Court in Boyd *vs.*

The United States (116 U. S., 616). In that case the validity of the legislation authorizing the issuing of a warrant in revenue cases for the seizure of books was challenged and determined in the negative. The question was declared to turn upon the import of the language in the Fourth Amendment, "unreasonable searches and seizures," and in order to ascertain this, the Court, setting the example which we have endeavored to follow in this brief, went back to the struggle in England over the question of general warrants, which was terminated by the memorable judgment of Lord Camden in Entick *vs.* Carrington (19 St. Tr., 1029), and, declaring that that contest must have been familiar to the framers of the Constitution, did not hesitate to say that they must have entertained the same views which the lovers of liberty at that time entertained, both in England and in this country, and held the warrants to be illegal.

That struggle over general warrants of seizure was but a part of the struggle for the liberty of the press which has been herein recounted, as will be seen by a reference to Lord Camden's judgment; and the inference that the framers of the Constitution entertained the same views respecting general warrants as those declared by that great Judge is no clearer than the inference that by "Liberty of the Press" they intended the same liberty which, in that same struggle, he and the other advocates of popular rights asserted and successfully maintained. It cannot be that men who at that time thought it necessary to insert in the American Constitution provisions to forever secure the liberty

of the press, designed simply to protect the press against a censorship. The censorship had been dead for a century, and there was no possibility or thought of reviving it. There had been two parties upon the question of free discussion. Its enemies took the ground that the liberty of the press consisted simply in the absence of a censorship. Its friends asserted that whether a publication is innocent or criminal, must be left to the determination of a jury. It must have been this view which the founders of the American Commonwealths, both State and National, determined to incorporate into the fundamental law.

5. But, in truth, while the obnoxious practice of issuing general warrants was but part of the system of restraint upon free discussion, and the First and Fourth Amendments were thus aimed at substantially the same abuse of power, it may be said with equal truth that *all* of the ten amendments proposed by the First Congress had the same common object. They contain a precise enumeration of all the principal doctrines which had been asserted by the popular party in England during the entire struggle against prerogative and power, and which together constituted what was then, and still is, known as Civil Liberty. Each one of them points to a particular liberty which had long been striven for, and stamps it as something which was to be forever thereafter deemed as finally secured and placed beyond future peril.

6. The contemporaneous exposition by those principally instrumental in the framing of the Constitution is in entire accordance with the foregoing views. It is nowhere better expressed than in Hamilton's masterly brief in the celebrated case of The People *vs.* Croswell, an indictment for a libel upon Thomas Jefferson, President of the United States.

"I.—The liberty of the press consists in the "right to publish *with impunity* truth, with "good motives, for justifiable ends, though "reflecting on government, magistracy or "individuals.

"II.—That the allowance of this right is "essential to the preservation of free govern- "ment—the disallowance of it fatal.

"III.—That its abuse is to be guarded "against by subjecting the exercise of it to the "animadversion and control of the tribunals "of justice; *but that this control cannot safely "be entrusted to a permanent body of magis- "tracy, and requires the effectual co-operation "of Court and jury.*

"IV.—That to confine the jury to the "mere question of publication and the ap- "plication of terms, without the right of "inquiry into the intent or tendency, refer- "ring to the Court the exclusive right of "pronouncing upon the construction, ten- "dency and intent of the alleged libel is "calculated to render nugatory the function "of the jury, enabling the Court to make a "libel of any writing whatsoever, the most "innocent or commendable.

"V.—That it is the general rule of criminal "law, that the intent constitutes the crime, "and that it is equally a general rule that "the intent, mind, or *quo animo*, is an in- "ference of fact to be drawn by the jury.

"VI.—That if there are exceptions to this "rule they are confined in cases in which "not only the principal fact, but its circum- "stances, can be and are defined by statute, "or judicial precedent.

"VII.—That in respect to libel there is no "such specific and precise definition of facts "and circumstances to be found; that con- "sequently it is difficult, if not impossible, "to pronounce that any libel is, *per se* and "exclusive of all circumstances, libellous; "that its libellous character must depend "upon intent and tendency, the one and the "other being matters of fact."

This precise and elegant statement of the law was supported by a luminous argument reviewing the whole law of libel and its history, showing that it was the ancient law, and that Mr. Fox's act was declaratory merely. It received the full assent of Kent, afterwards Chancellor, whose opinion contains a most elaborate scrutiny of the doctrine of Lord Mansfield, and declares that he and the Judges who followed him had "involved "themselves in inconsistency and paradox; "and I am induced to believe that it is a de- "parture from the ancient, simple and true "history of the trial by jury in criminal "cases."

Hamilton's Works (N. Y., 1886), Vol. 7, pp. 333, *et seq.*

People *vs.* Croswell, 3 Johns. Cases, 336, 365.

7. The Alien and Sedition Law of 1798 contained provisions for the punishment of libels against the government which became the subject of violent controversy. These provisions were deemed unconstitutional by many of the most enlightened statesmen, including Madison, the author of the Report of the Virginia House of Delegates. Their unconstitutionality seems to have been conceded in the discussion herein referred to in the U. S. Senate in 1836. But no attempt was made by this statute to define what publications should be punishable so as to restrict the office or the power of a jury. The design simply was to make libels upon the U. S. Government punishable just as libels against the British Government had always been punishable at common law. This could not be done without the aid of an express statute, for the Courts of the United States have no common law jurisdiction in criminal cases (United States *vs.* Hudson, 7 Cr., 33). It could with great plausibility be argued that that government should not remain stripped of power to defend itself against any libel however seditious. And this law proceeded upon a full acknowledgment of the doctrine of the liberty of the press as herein maintained. It sought to lay down no new definition of the law of libel, but made that offense to consist in publications designed and tending to overthrow the government or bring it into contempt, thus making the *intent* an essential element of the crime. And, moreover, it allowed by express provisions, that the truth might be proved by way of

defense; and *clothed the jury with the right to determine both the law and the fact.*

Act of July 14th, 1798. Stat. at Large, Vol. 1, page 596.

**IV.**—If the foregoing discussion has been in any degree successful, it has established that the phrase "Liberty of the Press," as employed in the First Amendment, imported that measure of liberty which permits, without previous restraint, the publication of any writing whatever, and without the restraint of any *subsequent penalty*, unless it should be found by a jury on a regular trial to be such a publication as the law then condemned as libellous.

The immediate purpose and effect of the amendment was to place this great safeguard of liberty beyond the peril of the exercise even of the *legislative* power.

1. The framers of our Constitution did not require to be taught that all safeguards for the protection of rights must be erected against the *possessors of power*, whoever they might be; nor did they fail to perceive that the doing away with a monarch had no effect to destroy, but only to *transfer*, power. It was equally clear to them that in such a division as they proposed of legislative, executive and judicial powers, the Legislature would be the superior body, and encroachments from that quarter were most to be apprehended.

The Federalist, Nos. 48 and 49.

2. It was not from the executive or the judicial departments that they apprehended any invasions of the liberty of the press. They had left the former without any pretense for the exertion of a restraining authority; and the latter, being in no manner bound to, or dependent upon, a permanent or hereditary sovereign, was quite unlikely to become united in any such endeavor. But the case was quite different with the Legislature. Its power would be wielded by a *majority*, which might easily be influenced to the adoption of questionable measures by a belief that its supremacy could thus be perpetuated. Striking directly at this danger, they thus framed their safeguard: "*Congress shall make no law* * * * * * abridging the freedom "of speech, or of the press." This bestowed upon the people of the United States a protection which could not be gained in Great Britain, and constituted the final stage in the security of the liberty of the press.

3. The result of the contest in England was to preclude *Judges*—the fixed and permanent magistracy—from making the question of the guilt or innocence of a publication a question of *law*, and taking it away from the jury by *judicial definitions* of what publications should be deemed libellous. Such definitions, however, may just as well be made by legislative *enactment*. That power Parliament still retained. But the framers of the Constitution went further and forever precluded Congress from making any such *legislative* definitions. Congress, therefore,

cannot *describe* any publication by any narrower description than *seditious, libellous,* or equivalent terms, and declare that the publications so described shall be *deemed to be* seditious, or libellous, and punishable as such.

And a very learned writer is of opinion that under free governments like ours there is no place for any system of repressing libellous publications except when made with intent to incite rebellion or civil war.

Cooley Const. Limitations, 526.

**V.**—Having determined the import of the term "freedom of the press," as employed in the First Amendment, we are now prepared for the main inquiry whether the statute in question is a law *abridging* that freedom. That such is its character is very clear.

1. That freedom includes not only the liberty of *printing*, but the liberty of *publishing*. The former would be empty indeed without the latter. And the liberty of *publishing* must be co-extensive with the liberty of *printing*. And what is *publishing?* It is the *communication to others* of what is printed; in other words, it is *circulating*. *Publishing* and *circulating* are admitted to be synonymous (*Ex parte* Jackson, 96 U. S., 727). And what was the liberty of *publishing*, which existed at the time of the adoption of the Constitution? It was the liberty of

*circulating* printed matter in all practicable forms.

2. The case of *ex parte* Jackson (96 U. S., 727), by its reasoning, seems effectually to determine that the statute under notice is invalid upon the ground now asserted. That decision proceeded upon the view that Congress had the right to refuse the facilities of the mails to lottery mattery, but it fully conceded that it could not prohibit the circulation of such matter in other ways (p. 735).

3. It may perhaps be urged that the statute does not apply to printed matter generally relating to lotteries, but only to papers purporting to be, or represent *tickets*, or chances, and to advertisements of lotteries.

But will it be claimed that this prohibition of the carriage of advertisements, which are ordinarily contained in newspapers, is not an invasion of the liberty of the press?

**Lastly.**—The judgment should be reversed, and a new trial ordered.

JAMES C. CARTER,
Of Counsel for Plaintiffs in Error.

# Supreme Court of the United States.

October Term, 1901.

## No. 293.

John Francis, Anthony Hoff and John Edgar,

*Petitioners,*

*vs.*

The United States of America,

*Respondent.*

...CRIMINAL...

## Memorandum Brief for Oral Argument.

### Statement of the Case.

The petitioners, John Francis, Anthony Hoff and John Edgar, together with Charles W. Reilley, who has since died, were convicted at the February Term, 1900, of the District Court of the United States, within and for the Southern District of Ohio, Western Division, upon an indictment presented and returned in said Court, in which they were charged with violating Section 5540 of the Revised Statutes of the United

States, which in terms makes it a crime to conspire to commit an offense against the United States.

The overt act, which they were charged with having conspired to commit, was the alleged causing to be carried from one state to another, to-wit; from Newport, Kentucky, to Cincinnati, Ohio, papers, certificates and instruments purporting to be and to represent tickets, chances, shares and interests in, and dependent upon the event of lottery and similar enterprise offering prizes dependent upon lot or chance.

Upon conviction, sentences were pronounced against said petitioners, and thereafter said petitioners duly prosecuted error to the Circuit Court of Appeals, for the Sixth Circuit, and upon submission of said cause and writ of error to said Circuit Court of Appeals, the judgment of said District Court was affirmed.

## The Act of March 2, 1895,

The overt act charged as criminal, was allleged to be such because it was a violation, as was charged, of the first section of the Act of March 2, 1895, which is as follows:

Chapter 191. An act for the suppression of lottery traffic through national and interstate commerce and the postal service, subject to the jurisdiction and the laws of the United States.

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, or deposited in or carried by the mails of the United States, or carried from one state to another in the United States, any paper, certificate or instrument, purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of a lottery, so called gift concert or similar enterprise, offering prizes dependent on lot or chance, or shall cause any advertisement of such lottery, so-called gift concert or similar

> enterprise, offering prizes dependant upon lot or chance, to be brought into the United States, or deposited in or carried by the mails of the United States, or transferred from one state to another in the same, shall be punishable in the first offense by imprisonment for not more than two years, or by a fine of not more than one thousand dollars, or both, and in the second and after offense by such imprisonment only."

The validity of the first section of the act just cited, was called in question during the trial by the several motions to quash and motions to acquit, and after verdict by motions in arrest of judgment.

Proper exceptions to the rulings of the court thereon were duly taken and reserved, and were fully set forth and indicated in their certain bills of exceptions, and were distinctly and accurately noted and alleged in said petition for a writ of error and said assignment of error, and the question of the validity of said act of March 2, 1895, is again now respectfully presented and urged upon the consideration of this Honorable Court.

The petition for the allowance of a writ of certiorari having been heretofore granted, the entire case is now before this Court for examination and review.

As stated by Mr. Justice Brown in the opinion of this Court, delivered in Panama Railroad *v.* Napier Shipping Company, 166 U. S., at page 284.

> "But while the Court of Appeals may have been limited on the second appeal to questions arising upon the amount of damages, no such limitations applies to this Court, when in the exercise of its supervisory jurisdiction it issues a writ of certiorari to bring up the whole record. Upon such writ the entire case is before us for examination."

## CHAMPION *v.* AMES, distinguished.

Before proceeding to discuss the record in this case, it is well to bear in mind that the case presented upon this record differs in many aspects from the record in the case of Charles F. Champion *v.* John C. Ames, United States Marshal, assigned for argument with this case; the distinction, however, between the two cases being one that can most properly be suggested when we come to discuss the sufficiency of the indictment under which the petitioners herein were prosecuted and convicted.

The question of the validity of the first section of the Act of March 2, 1895 is involved alike in each case. The means of transportation from one state to another of the so-called "papers, certificates and instruments purporting to be and representing tickets, chances, shares and interests in, and dependent upon the event of a lottery thereafter to take place, offering prizes dependent upon lot and chance etc." was, in the former case, The Wells, Fargo Express Company, a corporation, etc., while in the latter it is charged that the defendants conspired together "to cause to be carried from one state to another in the United States, to-wit: from the City of Newport in the State of Kentucky, to the City of Cincinnati, in the State of Ohio, papers, certificates and instruments purporting to be and to represent tickets, chances, shares and interests in and dependent upon the event of a lottery and similar enterprise, offering prizes dependent upon lot and chance, etc."; the carrying or transportation being, according to the record, by the individual and not by express or other instrumentality, and the 'papers, certificates and instruments" carried, being slips of paper, upon which were written in lead pencil certain numbers and figures, but which contained no other token of ownership, character, object, value or design.

We propose to discuss the questions arising upon the record in this case in the following order:

First: *Is the first section of the Act of March 2, 1895, a valid act?*

Second: *If valid, is the indictment sufficient in form and substance to warrant any conviction had under it?*

Third: *If so, do the record facts sustain such conviction?*

It is claimed, and of course evident, that the validity of the act in question can only be sustained as a regulation of commerce "among the several states" under the powers conferred upon Congress by the Constitution, as embraced in paragraph 3, section 8, article 1, thereof.

The act by its title is not in terms declaratory of a regulation of commerce but the suppression of an evil.

A proper presentation of the argument upon the validity of this act cannot, we think, be made, without preliminary thereto, we ascertain and adopt the most comprehensive, and at the same time the most authoritative deffinition of the term "commerce."

This can be most readily accomplished by accepting the definition of "commerce" given by Chief Justice Marshall in the very early case of Gibbons *v.* Ogden, 9 Wheat., 1, which is:

> "Commerce, undoubtedly is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

In the case of the United States *v.* E. C. Knight Company, 156 U. S., 1–12, we find in the opinion of Chief Justice Fuller that the definition given to commerce by Chief Justice Marshall is adopted and approved as follows:

> " 'Commerce, undoubtedly, is traffic,' said Chief Justice Marshall, 'but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse.' That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the state. " Citing ;
>
> Gibbons *v.* Ogden, 9 Wheat., 1—189—210.
> Brown *v.* Maryland, 12 Wheat., 419—448.
> The Licence cases, 5 How., 204—599.
> Mobile *v.* Kimball, 102 U. S., 691.
> Bowman *v.* Chicago and N. & W. Railway, 125 U. S., 465.
> Leisy *v.* Hardin, 135 U. S., 100.
> In re Rahrer, 140 U. S., 545, 555.

And at page 12 of the same opinion the Chief Justice continues :

> "It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the states as required by our dual form of government ; and acknowledged evils, however grave and urgent they may appear to be, had better ce borne than the risk be run, in an effort to suppress them, of more serious consequences by report to expedients of even doubtful constitutionality."

And says again with apparent emphasis :

"The regulation of commerce applies to subjects of commerce and not to matters of internal police."

Another rule of construction and interpretation by which we are to be guided in this discussion is found in the language of this Court in the case of Minnesota *v.* Barber, 136 U. S., 313;

> "In whatever language a statute may be framed, its purpose must be determinod by its natural and reasonable effect, and the presumption that it was enacted in good faith, for the purpose expressed in the title, cannot control the determination of the question whether it is or is not repugnant to the constitution of the United States."

In line with this authority and announcing the same rule of construction, are the following:

City of New York *v.* Miln, 11 Pet., 103.
Passenger cases, 7 How., 283.
Henierson *v.* Wickham, 92 U. S., 259.
U. S. *v.* Fox, 95 U. S., 370.
Yick Wo. *v.* Hopkins, 118 U. S., 356.
Morgan Rd. *v.* Lousiana, 118 U. S., 455, 462.

Another cardinal rule in the interpretation of the Act of March 2, 1895, may also be found in the opinion of Chief Justice Marshall in the case of Gibbons *v.* Ogden, wherein he says:

> "What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in

> Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution."

This forcible language is repeated by Chief Justice Fuller in the case of Leisey *v.* Hardin, 135 U. S.. 100-108:

Having in mind, therefore at all times the rules by which in our judgment, a proper construction and interpretation of this act of March 2, 1895, is to be determined we contend that there are but two interpretations of the words of the Constitution, "*carried from one state to another in the United States*," namely:

First—*That the act of carrying an article must be in furtherance of some commercial transaction, otherwise Congress would have no power under the commerce clause of the Constitution or otherwise, to make such act of carriage or transportation from one state to another, a crime; and,*

Second—*The article carried must be a recognized article of commerce, otherwise if the article has ceased to be such, Congress no longer has any power over it.*

Upon the first proposition it must be apparent from even a superficial reading of the act of March 2, 1895, that the transportation of any article from one state to another, whether it be by railroad, express company or other common carrier, or by any other instrumentality, save and except the mails, cannot in the light of the definition of commerce or of the rule prescribed for the regulation thereof, be within the power of Congress to control, *unless the object and purpose of the transportation from state to state be incidental to or connected with commercial intercourse*, for, if the language of the statute is read literally, it would be a crime for an individual, with no purpose or intent to traffic in the same, to carry the prescribed lottery ticket from Cincinnati, in the state of Ohio to Newport, in the state of Kentucky.

As illustrating the force of this suggestion, we do not believe that if a person who has ever so innocently come into the possession of out and out lottery tickets, with every badge to identify them as such, should either personally carry them, or by direction of another, cause them to be carried from one of the states named to the other, for the purpose of having them destroyed, could commit a crime, and yet read literally the statute would make it such. It must be certainly apparent that such an act upon the part of an individual, could not in any other way be construed or distorted into either traffic or commercial intercourse. It would be the mere act of going from one city to another with a lottery ticket in his possession, with no intent on earth to dispose of it, but with the deliberate design to have it destroyed. Would it be possible to say that such a situation could have been, in any sense, within the contemplation of the framers of the Constitution when they enumerated the powers of Congress as affecting the regulation of commerce.

It is claimed on the part of the Attorney General, and so determined by the Circuit Court of Appeals in the decision of that court in this case, that the first section of the act of March 2, 1895, defines three separate and distinct offenses.

First—That it is an offense defined by the act for any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, any paper, certificate or instrument purporting to be or to represent, a ticket, chance, share or interest in or dependent upon the event of a lottery or similar enterprise, offering prizes dependent upon lot or chance.

Second—That it shall be an offense for any person to deposit in, or caused to be carried by the mails of the United States any such paper, certificate or iustrument, etc.

Third—That it shall be an offense for any person to carry or cause to be carried from one state to another in the United States any such paper, certificate or instrument, etc.

If this interpretation is to be given to the statute, and the second and third or not to be qualified by the language "for the purpose of disposing of the same," then the third offense so claimed to be described in this act fails utterly to comprehend within the language used, the design or purpose of barter, sale, exchange or commercial intercourse, and leaves such an offense to be the mere act of carrying the thing described, from one state to another, by the individual, or by another under his direction; a condition over which, we contend, Congress has no control, for if it lacks the ingredient of commerce, however defined, it put the case beyond the power of Congress to regulate.

We have never heard it contended that the third offense, thus indicated by the segregation of the statute, is so qualified by the language preceding it, nor is there anything in the statute following the language descriptive of the third offense which, distinctly, or by implication, could bring it within the pale of a commercial transaction. There is no rule of interpretation or construction of a statute, which we are aware of, which will permit a state of facts to be distorted into the commission of a crime, by the interpolation of words not in the statute. *Criminal statutes are to be strictly construed.*

We believe that congress, under its delegated power as to commerce, has the right to proscribe against certain articles or things and make the commerce or traffic in such things, by transporting them from one state to another, an offense against its laws. We insist, however, that there must always be an act of commercial intercourse in the process of that transportation from state to state to give Congress the power to either proscribe against it or regulate it. Congress would certainly have no power to prohibit a citizen of one state going into another for purely social purposes. It is only when that individual undertakes to engage in interstate commerce that his act falls within the regulations that Congress may prescribe.

There is no state in the Union, that were aware of, which has not adopted or enacted prohibitive constitutional provision or legislative enactment against lotteries. There is no state in the Union, that we are aware of, where a contract made for the purchase or sale of lottery tickets could be enforced; and everywhere it has been enacted that engaging in any game of chance, whereby anything of value is wagered, is gambling. Gambling never was and never can be said to be commerce. *The record in this case, if it makes out anything, makes out a case of interstate gambling, and not interstate commerce.*

> "The protection of the Constitution does not extend to lotteries, games of chance, or speculation. These may be interstate gambling, but are not commerce."

Prentice & Egan on Commerce Clause of the Federal Constitution, page 55.

> "A state may prohibit buying or selling what are commonly known as futures."
>
> Fortenbery *v.* State, 47 Ark., 188.
> Alexander *v.* State, 86 Geo., 246.

> "A state may prohibit the sale of lottery tickets or of bonds containing conditions which make their value dependent upon chance."
>
> Ballock *v.* State of Maryland, 73 Maryland, 1.
> Roselle *v.* McAuliffe, 39 Southwestern, (Mo.) 274.

> "A state may prohibit the sale of pools on horse races conducted without the state, although not forbidden as to races conducted within the state.
>
> State *v.* Stripling, 113 Ala., 130.

> "And may forbid the sending of money without the state for gambling purposes."
>
> Lacey *v.* Palmer, 93 Va., 159.
> State *v.* Harbourne, 40 Atlantic Reporter, (Conn.) 179.

In order to illustrate the extremity of the argument which must be indulged in by the Attorney General to sustain his contention in support of the validity of this statute, it is not improper, we think, to suggest what might be termed an extreme case, and yet one, we think, that, if the statute be literally construed, would fall within the third offense claimed to be defined by this act. If a man purchased a lottery ticket in the City of Newport, Kentucky, and place the same in his valise, and carry the same over the bridge to the City of Cincinnati, in the State of Ohio, with the intent solely of retaining posession of it to await the result of the lottery, he would nevertheless have committed a crime, if the Attorney General is correct.

It is our contention, gathered from the history of the commerce clause of the Constitution, from the introduction of the original resolution in the convention of 1787 by Edmund Randolph, and from the opinions of this Court in construing it, and in determining its application, that it was intended by the framers of the Constitution to clothe Congress with the power at all times to pass appropriate legislation to prevent burdensome, conflicting or discriminating state legislation in the matter of interstate commerce, and that it was never intended, nor do we interpret any decision upon the subject to hold that the commerce clause of the Constitution granted any such power to Congress as is claimed in this case by the Government, namely, to suppress interstate gambling. It was intended, in our judgment, that Congress should at all times have supervisory power over interstate commerce; to equalize, to level and to protect interstate commerce from unjust state discrimination or burdens, by proper Governmental regulation. It was never, in our judgment, the intention of the framers of the Constitution to empower Congress by this clause to regulate the morals of the citizens of the various states.

It is repeatedly contended by the Assistant Attorney General, in his belief, that the act of March 2, 1895, was passed

for the purpose of protecting legitimate commerce; that the transportation of lottery matter by other instrumentalities than the mails affected injuriously interstate commerce, and that it was detrimental to such commerce. We fail to observe how the transportation of lottery tickets can in any way be properly said to contaminate, obstruct or otherwise affect interstate commerce in other merchantable commodities. It does not intermingle so as to contaminate or defile, nor can it in any way impede, hinder or delay legitimate commerce. It relieves commerce from no burden, facilitates it in no way, and commerce, both foreign and interstate, would proceed after its enactment precisely as before.

Unless the mere transportation or carriage in any way, for any purpose, of any tangible thing across the boundary line separating two states is commerce, this statute can not be successfully defended.

> "The power conferred upon Congress by the commerce clause of the Constitution is exclusive so far as it relates to matters within its purview which are national in their character, and admit or require uniformity of regulation affecting all the states. That clause was adopted in order to secure such uniformity against discriminating state legislation." (County of Mobile *v.* Kimball, 102 U. S., 691).

Upon the subject of our second contention, namely, *that the article carried must be a recognized article of commerce, otherwise, if the article has ceased to be such, Congress no longer has any power over it*, we pass to a consideration of the authority which Congress possesses, to define, by legislation, what shall or shall not be articles of commerce.

In the consideration of this question we are at once confronted with the construction which was intended by the makers of the Constitution to be placed upon the twenty-one words composing this clause of the Constitution. It would

not, of course, be proper, in undertaking to interpret a section or paragraph of the Constitution, to limit its interpretation and application to such purposes or things then in existence, but by all fair means of interpretation rather to include everything which might come, by the lapse of time, to be fairly within the language employed.

> "There comes a time in the interpretation of a written Constitution when the rules, which are applied to other instruments, are no longer the only guides to its interpretation; a time when its history is of more importance than its origin; when the intention with which it was framed and adopted can no longer alone control in its application." (Prentice & Egan on the Commerce Clause of the Federal Constitution, page 36).

The counsel for the Government insist in their brief that lotteries and lottery tickets and all things incidental thereto are fairly contemplated by the commerce clause, because prior to, and for some years subsequent to the adoption of the Constitution in 1787, lotteries had been resorted to both by the Government and by individuals for various laudable purposes. We contend, on the other hand, that the lotteries and all things incident thereto have long since ceased to be articles of commerce. They rest today under the ban of repressive and prohibitive constitutional provision or legislative enactment in every state of the Union. Contracts affecting them are not enforcible in any court of law or equity in any state in the Union. While the existence of lotteries may have been known to those who helped make the Constitution what it is, it is perhaps enough to say that the business, so-called, of lotteries is just as much a thing of the past as the institution of slavery. It is our contention that whenever any article has ceased to be an article of commerce it is not and can not be treated as such. Lotteries and all things incident thereto have become obnoxious to the moral sense of the communities in every state of the Union; have fallen into the category of

subjects which belong to the police power of the several states and are no longer subject to the control of Congress as *articles of commerce*.

As an apt illustration of the contention we make, that there could be no commercial intercourse in lottery tickets, so-called, at the time of the passage of this law, March 2, 1895, because lottery tickets had ceased to be such, we may use the example afforded by the attempted traffic in counterfeit money.

Certainly no one will contend that counterfeit treasury notes could in any way or by any force of reasoning, logic or argument be included within any definition of "articles of commerce." Suppose, therefore, that a man so disposed, in the city of New York, and having in his possession a quantity of counterfeit bills, should offer them for sale to a citizen of Ohio, and the Ohio citizen was frail or susceptible enough to send a hundred dollars to the New York man, who in return would cause to be transported by an express company twenty thousand dollars of counterfeit bills. Could such a transaction be said to be an act of commerce? It might be said in reply that Congress could restrain or prohibit the distribution, transportation or dissemination of counterfeit bills by any means whatever, but it would do so, not under its delegated power to regulate commerce, but under the power granted it by the Constitution "to provide for the punishment of counterfeiting the securities and current coin of the United States." (Par. 6, Sec. 8, Art. 1—Court).

So, in regulating "commerce with the Indian Tribes," Congress has the power to perscribe, as incidental to the power to regulate, what merchantable articles shall or shall not enter into that commerce. It is under this power that spirituous liquors are proscribed. So also of obscene literature imported from abroad. But it is always because such things are articles of commerce and not that the acts passed by Congress in relation thereto are attempts to regulate morals by the assumption of police power. Illustrations of this kind might be

multiplied *ad libitum ;* yet, are we not at least confronted with the proposition,that in order to invest Congress with the power to legislate, it must be an act done in furtherance of commercial intercourse, concerning things recognized as articles of commerce ?

Our contention that lottery tickets cannot in any sense be held to be legitimate articles of commerce is verified.we think, by the decision of this Court in *Douglass v. Kentucky*, 168 U. S., 458, wherein it is held that a lottery grant is not in any sense a contract within the meaning of the constitution, but simply a gratuity, a license, which the state under its police power, and for the protection of the public morals, can at any time revoke. The Constitution of Kentucky of 1891, forbidding lotteries and gift enterprises, and revoking all lottery privileges or charters theretofore granted, was held not to be inconsistent with the contract clause of the Constitution of the United States, thereby clearly placing the regulation of lotteries within the exclusive domain of state legislation.

We are disposed to regard the language of Justice Harlan in delivering the opinion of this Court in *Douglass v. Kentucky*, at page 496, as verifying our contention that the police power to regulate injurious practices affecting the morals and welfare of its citizens is peculiarly, if not exclusively, within the police power of the state, and not one to be exercised by Congress.

> "Is a state forbidden by the supreme law of the land from protecting its people at all times from practices which it conceives to be attended by such ruinous results ? Can the legislature of a state contract away its power to establish such regulations as are reasonably necessary from time to time to protect the public morals against the evils of lottery?"

This act of March 2, 1895, by its very title does not propose to regulate commerce, but to suppress lottery traffic. It is manifetsly, therefore, not an effort upon the part of Congress to place restrictions upon commerce by any species of regu-

lation but it is a deliberate declatory enactment by Congress to regulate the morals of the people by the suppression of an evil which Congress has conceived to exist.

In upholding the validity of the clause of the Kentucky Constitution in question, Justice Harlan cites with approval the language of Chief Justice Waite in the case of *Stone v. Mississippi*, 101 U. S., 824, as follows:

> "No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself."

Again, referring to lotteries:

> "They disturbe the checks and balances of a well ordered community. Society built on such a foundation would almost of necessity bring forth a population of speculators and gamblers, living on the expectation of what, 'by casting of lots or lot, chance or otherwise,' might be 'awarded' to them from the accumulation of others. Certainly the right to suppress is governmental, to be exercised at all times by those in power at their discretion. Anyone, therefore, who accepts a lottery charter does so with the implied understanding that the people in their sovereign capacity, and through their properly constituted agencies may resume it at any time when the public good shall require, whether it be paid or not."

We understand this language to emphasize the declaration that the states of the Union are at all times clothed with the exclusive power to suppress and prevent by proper legislation, at any time that they see fit, at their discretion, acts or

things affecting the morals or welfare of the communities of the several states, and that the supression of lotteries is declared to be within the category of subjects to be controlled by state legislation.

If what we contend for in regard to lottery tickets is true, how much more forceful does the argument bear upon "lottery advertisements," the subject of the concluding paragraph of Section 1, of the act in question. Can there, in the nature of things, be any "commercial intercourse" in advertisements?

## Insufficiency of Indictment.

In presenting this question, we beg leave to submit such arguments as we feel flow naturally from an analysis of the act, by the segregation claimed for it, into three separate and distinct offenses, the relation which the second section bears to prior enactments of Congress on the same subject, specially exempted from repeal, and the total failure to plead in the indictment, facts sufficent to constitute any offense under this act, if valid.

Section 1 of the act reads as follows: "That any person who shall cause to be brought within the United States from abroad for the purpose of disposing of the same or deposit in or carry by mails of the United States, or carry from one State to another in the United States any paper, certificate or instrument purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of lottery, so-called gift concert or similar enterprise offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert or similar enterprise offering prizes dependent upon lot or chance, to be brought into the United States or transfer from one State to another of the same, shall be punished in the first offense by imprisonment for not more than two years or by a fine of not more then one thousand dollars, or both, and in the second and after offenses by such imprisoment only.

Second, That nothing herein contained shall be deemed to repeal by implication sections thirty-eight hundred and ninety-four, thirty nine hundred and twenty-nine, or forty hundred and forty-one of the United States Revised Statutes, or any part thereof, nor any provision of the Act of Congress of April 29, 1878, entitled, "An act to prevent the sale of policy or lottery tickets in the District of Columbia," nor any provision of the act of Congress September 19, 1890, entitled "An act to amend certain sections of the Revised Statutes relating to lotteries, and for other purposes," nor any provision of the laws whatsoever against the establishment of lotteries, or games, or other schemes, or prizes, or chances, or the traffic in or circulation of tickets and other such papers or instruments of the publication of advertisements or notices in any wise relating thereto."

The statutes, which are expressly retained in force by the provisions of the second section of this act, as above quoted, so far as they relate to the mailing and circulating of lottery tickets, advertisements, etc., are as follows:

Section 3894. No letter or circular concerning illegal lotteries, so-called gift concerts, or other similar enterprises, offering prizes, or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretenses, shall be carried in the mail. Any person who shall knowingly deposit or send anything to be conveyed by mail in violation of this section shall be punished by fine of not more than five hundred dollars, nor less than one hundred dollars, with costs of prosecution.

By an amendment passed July 12, 1876, the word "illegal" was struck out of the first line of the section above quoted.

Section 3929 authorizes the Postmaster General to cause all registered letters sent through the mail to be branded as fraudulent and returned to the sender when he is satisfied that they relate to fraudulent lotteries or other schemes or devices for obtaining money by false or fraudulent pretenses, and Sec-

tion 4041 forbids the payment of any postal or money order under substantially the same circumstances as set forth in 3929 and authorizes their return to the sender.

The Act of September 19, 1890, is as follows:

Be it enacted, etc., that Section 3894 of the Revised Statute be, and the same is, hereby amended to read as follows:

Section 3894. No letter, postal card, or circular, concerning any lottery, so called gift concert of other similar enterprise offering prizes dependent upon lot or chance, or concerning schemes devised for the purpose of obtaining money or property under false pretenses, and no list of the drawings at any lottery or similar scheme, and no lottery ticket or part thereof, and no check, draft, bill, money, postal note or money order for the purchase of any ticket, tickets or part thereof, or of any share or any chance in any such lottery or gift enterprise, shall be carried in the mail or delivered at or through any postoffice or branch thereof or by any letter carrier.

Nor shall any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance, or containing any list of prizes awarded at the drawings of any such lotteries or gift enterprise, whether said list is of any part or of all of the drawings, be carried in the mail or delivered by any postmaster or letter carrier.

Any person who shall deposit or cause to be deposited or shall knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of this section, or who shall knowingly cause to be delivered by mail, any thing herein forbidden to be carried by mail shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not more than five hundred dollars or by imprisoment for not more than one year, or by both such fine and imprisonment for each offense.

The tariff act of August 28, 1894, prohibits the importation into this country of "any lottery ticket or any advertisement

of any lottery," but it provides for no punishment except the forfeiture of the articles themselves.

The question, therefore, presents itself whether the Act of March 2, 1895, applies to any lottery ticket or lottery advertisement except such as shall be brought into this country from abroad for the purpose of being sold, or deposited in or carried in the mails or carried from one state to another. The act is very imperfectly drawn, and its construction is, for that reason, not by any means free from difficulty. According to the most reasonable construction of the first clause of the Act, its purpose was to prohibit the bringing of lottery tickets into this country from abroad for the purpose of disposing of them or for the purpose of depositing them in the mails of the United States, or for the purpose of carrying them from one state to another within the United States. In order to place any other construction upon it, the language employed must not only be disregarded to a certain extent, but it must be reconstructed in orderto make it grammatical and very important words must be interpolated—two things which can never be done in dealing with a highly penal statute. The act specifies the things which constitute the offense, all of which relate to the same tickets, that is, tickets brought into this country from abroad. If it had been intended to prohibit and punish, under this act, the depositing in the mails or the carrying from one state to another of lottery tickets of all kinds, domestic and foreign, the words "deposited in" etc., and the words "or carry from one State to another in the United States" would have been preceded by some appropriate language to show that they were disconnected from the original act of causing the tickets to be brought into the United States from abroad. If the statute, after the clause relating to the tickets brought into the United States, had said: "or any person who shall cause any lottery tickets" to be deposited in or carried by the mails in the United States, "or to be carried from one state to another within the United States", etc., the intention of Congress to embrace all lottery tickets, papers, etc., within

the provisions of the Act would have been clear, but no such words are used. To what tickets, therefore, do the words, "or deposit in," etc., and the words, "or carry from one state to another," refer? It seems clear that they must refer to such tickets only as have been brought within the United States from abroad. No other tickets are mentioned, either in the first or second clauses of the Act, or, at least, no other tickets are in express terms referred to in the Act.

It is the bringing of the prohibited tickets, advertisements, etc., or causing them to be brought into this country from abroad with the purpose or intent to dispose of them, or to cause them to be deposited in the mails, or to carry them from one state to another, that constitutes the offense defined and punished in this Act, and the offense is complete when they have been brought here with such intent or purpose. In a prosecution for any of these offenses, it would not be necessary to allege or prove that the accused had actually sold or disposed of the tickets, or had actually caused them to be deposited in the mails or carried from one state to another.

This view of the statute is greatly strengthened by reference to the previous legislation of Congress on the same general subject, which was not repealed by the Act of 1895. The punishment provided for a violation of the Act under consideration is imprisonment for not more than two years, or a fine not exceeding $1,000 or both, for the first offense, and imprisonment alone for the second and all subsequent offenses, whereas under the Act of September 19, 1890, which is expressly retained in force, the punishment is a fine of not more than $500 or imprisonment for not more than one year or both. If therefore, the Act of 1895, applies to all lottery tickets and all advertisements of lotteries, whether brought here from abroad or not, there are two statutes in force prescribing different punishments for precisely the same offense; but if the last act relates only to tickets, advertisements, etc., brought here from abroad, the legislation upon the subject is perfectly consistent. Persons depositing in the mails lottery

tickets and other prohibited papers brought here from abroad would be punished by a fine not exceeding $1,000, or imprisonment for a period not exceeding two years, or both, while persons depositing tickets brought into this country from abroad, would be punishable under the Act of September 19, 1890, by a fine not exceeding 500 or imprisonment for not more than one year, or both. The legislation for the exclusion of lottery tickets and advertisements generally from the mails, and for punishment of persons violating the laws relating to that subject, was complete before the Act of March 2, 1895, was passed, and Congress had also prohibited the importation of tickets and advertisements from abroad, but had not, up to that time prescribed any punishment except the forfeiture of the imported papers. All that remained to be done, therefore, was to provide for the punishment of persons who might bring here for sale, or circulation, foreign lottery tickets and advertisements, and this was done by the Act of 1895, which, as shown by its express terms, was not intended to repeal or to interfere in any manner with the execution of previous statutes. If this act embraces domestic lottery tickets and advertisements, then it is plainly irreconcilable with the prior laws on the same subject, and all of them cannot be enforced, thus showing that they were not intended to relate to the same offense.

In construing this statute we might look into the title and the language employed to ascertain what was the legislative intent.

Bishop, in his work on Statutory Crimes, lays this down a an elementary principle. See page 200 and cases there cited.

> "Persons can not be made subject to such statutes by implication. Only those which are included within them in both spirit and letter, and all doubts in such statute are to be resolved in favor of the accused."

See Bishop on Statutory Crimes, Sec. 194.

As said by Chief Justice Marshall in the case of the United States *v.* Wilkesburg, 5th Wheat., 76—96:

> "The determination that the case is within the intention of the statute does not authorize us to say so. It would be dangerous indeed to assert that the case, which is within the reason and limit of the statute, is within its purview so far as to the punishment of the crime not enumerated in the statute, because it is of greater atrocity, or of a kindred character with those which are enumerated. If this principle has ever been adopted, except in criminal law, it has been in cases of considerable irritation which it would be unsafe to consider as precedence"

The first question to which we desire to call attention, admitting for the sake of argument that the law in question, to-wit, the Act of March 2d, 1895, is constitutional, we nevertheless contend that the facts stated and the allegations contained in the indictment do not charge an offense prohibited by said enactment.

It is a well settled rule of criminal pleading that the indictment must contain each and every element constituting the crime necessary to be proven upon the trial in order to support a conviction.

See,

Anderson *v.* State, 7 O. S., 2 pt., 250.
Birnly *v.* State, 8 O. S., 1 pt., 230.
Lougee *v.* State, 11 O. R., 269.
Lamberton *v.* State, 11 O. R., 284.
Miller *v.* State, 3 O. S.
Cheadle *v.* State, 4 O. S.
Dillingham *v.* State, 5 O. S., 280.
Third portion of Opinion, Bishop's Cr. Pro., p. 464.
Bishop on Crim. Pro., pp. 369, 370, 371.
Davis *v.* State, 19 R. S., 270.

Carper *v.* State, 27 O. S., 575.
Mackey *v.* State, 3 O. S., 362.
U. S. *v.* Cook, 17 Wall, 174.
U. S. *v.* Reese, 92 U. S., 225.
U. S. *v.* Cruikshank, 92 U. S., 558.

In construing this statute we may look into the title and the language employed to ascertain what was the legislative intent. Bishop, in his work on Statutory Crimes, so holds. See page 200 and cases there cited.

Therefore, taking this rule of interpretation, we find that the carrying was not intended by this statute to be made a crime, but there was another essential element which must be concomitant with the act of carrying, to-wit, for the purpose of disposing of the same. Let us look at the language employed and see if such is not the manifest purpose and intention of the act.

First, the title, "An act for the suppression of the lottery traffic through national and interstate commerce and the postal service subject to the jurisdiction of the laws of the United States." we shall contend that it never was the purpose of Congress to control the action of individuals in coming to and from the states. Therefore the language, "Be it enacted, etc., that any person who shall cause to be brought into this country from abroad for the purpose of disposing of the same" (so we see the legislative enactment up to this point has for its purpose the punishment of the persons who, by the act of carrying, have also the purpose in mind of disposing of the same), "or deposited in or carried by the mails of the United States or carried from one State to another" (making three distinct, substantive offenses) "any paper, certificates or instruments purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of a lottery, so called gift concert or similar enterprise offering prizes dependent upon lot or chance."

And we shall further contend, that having in possession a lottery ticket and going from one state to another would not make it an offense against this law, as it is manifest that it was the intention to make that penal which *pertained to the disposition of the same*, for the very first clause of the section, "that any person who shall cause to be brought within the United States from abroad for the purpose of disposing of the same," and coupling the act of bringing with the intention of disposing of the same, making both essential elements in order to constitute a crime.

We are of the opinion that the indictment should set forth the carrying for the purpose of disposing. We regard the purpose of disposing of as a material allegation, and the rule of criminal pleading is that the indictment must state every intent or action that constitutes the criminal design. It is the intent or purpose which gives character to the action and makes that criminal which would otherwise be exempt from guilt. In this proposition we are clearly supported by every elementary work on criminal law, and the following citations in point are submitted:

U. S. *v.* Cook, 17 Wall., 174.
Lougee *v.* State, 110 R., 69.
U. S. *v.* Rees, 92 U. S., 225.
Lamberton *v.* State, 11 O. R., 284.
U. S. *v.* Cruikshank, 92 U. S., 558.
Bishop on Crim. Pro., pt. 484.
Anderson *v.* State, 7 O. R., 2 pt., 250.
Birnly *v.* State, 8 O. R., 1 pt., 230.

In order to bring this indictment within the purview of this statute, it seems to us that it would be necessary to destroy that well recognized principle of the construction of criminal statute:

> *"No case is to be brought by construction within the statute unless it is completely within its words."*

See Bishop on Statutory Cr., p. 220.

Hawkins lays down the rule:

> "No parallel case which comes within the same mischief shall be construed to be within the purview of it (statute) unless it can be brought within the meaning of the word."

2 Hawkins P. C. Curw., 188, p. 16.

Therefore, if the case is fully within the mischief to be remedied, and is even of the same class and within the same reason as other cases enumerated, still, if not within the words, construction will not be permitted to bring it within the statute. See

Rex *v* Hammond, 2 East P. C., 1 Leach, 4 Ed. 444.
Leonard *v.* Bosworth, 4 Com., 421.
Hall *v.* State, 20 O., 7.
Rex. *v* Senior, 1 Leach, 4 Ed., 496, 2 East P. C., 993.
Melody *v.* Reab, 4 Mass., 471, 473.
Rex. *v.* Ellis, 8 D. & R., 175.
State *v.* Lovett, 3 Vt., 110.
Rex. *v.* Paddle, Russ & Ry., 484.
Carpenter *v.* People, 8 Bar., 603.
State *v.* Cooper, 16 Vt., 551.
Hamuel *v.* State, 5 Mo., 260.
Sharp's Case, 2 Lewin, 233.
Kyle *v.* State, 10 Ala., 256, 2 East P. C., 910.
Hawkins *v.* State, 3 Stew., p. 63.
State *v.* Smitherman, 1 Ire., 14.
Rex. *v.* Remmant, 5 T. R., 169.
Rex. *v.* Mellish, Russ & Ry., 80.
Rex. *v.* Turner, 8 Car & P., 756.
Reg. *v.* Scott, 3 Q. B., 543.
Campbell *v.* Com., 2 Rob., Va., 791.

State *v.* Curtis, 5 Hum., 601.
Com. *v.* Barrett, 9 Leigh, 666.

There is another well settled principal of law, to-wit: Do the words used as explanatory of the offense charged bring it fairly within the language of the statute? If not, a crime is not charged, and the indictment is defective.

See

Bishop Cr. Pro., p. 108.
Hagar *v.* State, 25 O. S., 268.
Wilson *v.* State, 34 O. S. 204.
Wharton Crim. Law. pp. 81–82.
Murphy *v.* State, 28 Miss., 637.
Norris *v.* State, 33 Miss., 373.
Newcomb *v.* State, 37 Miss., 383.
Bishop Crim. Pro., Vol. 1, 403-404.

It is generally a good rule in indictments that the special manner of the whole fact ought to be set forth with such certainty that it may judicially appear to the Court that the indictors have not gone upon record.

See

Hawkins P. C., 25 pp. 57.

In the case of the United States *v.* Mills, 7 Peters, 142, the Court says:

> "This constitutional right was construed to mean that the indictment must set forth the offense with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged."

The same rule is laid down in U. S. *v.* Cook, 17 Wallace, 174, in which the Court says:

> "Every ingredient of which the offense is composed must be accurately and clearly charged."

The same is held in Cruikshank *v.* U. S., Vol. 92, pages 557, 558.

By our criminal law the accused cannot obtain a new trial upon the ground that if he had more accurately known the offense with which he was charged he could have satisfactorily established his innocence; hence, particularity in the indictment is therefore required and the absence of material element of the crime makes the indictment fatally defective. This precaution and precision in pleading is also necessary in order that the defendant may know what crime he is called upon to answer and that the court may see that a definite offense appears upon the record to pronounce the judgment and award the punishment which the law prescribed.

See

U. S. *v.* Cook, 17 Wall., 174.
U. S. *v.* Reese, 92 U. S., 225.
U. S. *v.* Cruikshank, 92 U. S., 558.
Com. *v.* Dean, 109 Mass., 352.
Com. *v.* Blood, 4 Gray, 31.
Com. *v.* Phelps, 11 Gray, 73.
Com. *v.* Burke; 14 Gray, 81.

The criminal nature of the offense is a construction of law from the facts and circumstances of the case. The indictment, therefore, should set out precisely all the facts and circumstances which render the defendant guilty of the offense charged, otherwise the law relating from the facts would be a question of fact for the jury.

Lord Mansfield lays down the rule that every crime ought to appear on the record with scrupulous certainty. Therefore, the language in this indictment is, in our judgment, wholly insufficient. See

Rex. *v.* White, Cald., 187.
Rex. *v.* Marshall, 1 Moody C. C., 158.

"Did feloniously conspire together with one another to commit an offense against the United States, to wit: to cause to be carried from one state to another in the United States, to-wit, from the City of Newport in the State of Kentucky, to the City of Cincinnati in the State of Ohio, papers, certificates and instruments purporting to be or represent, as they then and there well knew, lottery tickets, chances, shares or interest in a game dependent upon the event of a lottery or similar enterprise offering prizes dependent upon lot or chance." That the tickets was issued as a chance upon a lottery is an essential element; therefore the defendant should be advised in the indictment as to what lottery, where the lottery, when the lottery, in what manner the lottery was to have been conducted, and there should be proof that a lottery was conducted. Every material element that was necessary to be proven upon the trial should be alleged in the indictment, otherwise the same is fatally defective.

The indictment does not set forth any prizes. If it is clear that they have a right to interpret the figures in the indictment that they have a significance and meaning, such are alleged by way of innuendo, otherwise the defendant is not advised. The mere conclusion of law in the indictment is not sufficient.

It is a well settled principle in the construction of criminal statutes that it must be a strict construction, that nothing shall be taken by way of intendment; unless the matter alleged falls within the strict and literal interpretation of the statute it must be excluded, or in other words it cannot be included.

As we take the act of March 2, 1895, it was intended to reach a class of persons who might cause to be brought tickets, etc, *from abroad* for the purpose of *disposing* of the same. The mere possession of such tickets, etc., was not made a crime. The gist of the offense was the criminal possession for the purpose of disposing of the same.

Who did he procure to carry should be alleged. Every element that is necessary to prove should be alleged.

No allegation as to where the lottery, when the lottery, or what the lottery, or what the prize, etc.

Any paper, certificate or instrument purporting to be or represent a ticket, etc. What interest does the letter or figures mentioned in the indictment purport?

To purport is to intend, to show; it must be manifest, it must be apparent.

There is no innuendo or allegation or setting forth of any fact which would justify a conclusion of law.

What figures represent a chance, etc.?

"And did represent various combinations of numbers selected by one H. T. Harrison and other players and persons to the grand jurors unknown."

It is not alleged that this defendant was aware of that fact.

What chance, what interest in what lottery did H. T. Harrison have a claim, etc.?

The descriptive part of the statute makes it a crime to deal in schemes of chance depending upon lot or chance. How then can such a paper ticket or whatever it may be called be recognized other than as a gambling scheme.

## CHANCE

An event which happens without any assigned cause.

## LOT.

That may be as-igned, designated or set over; not necessarily dependent upon chance.

## The Court Erred in refusing respective requests of Defendants that they should go acquit at the close of the testimony for the Government.

We need cite no authority upon the proposition that the Government must prove the charges as laid in the indictment, and the venue becomes a material part thereof.

The Constitution of the United States in Art. 3, Section 2, provides.

> "That a person must be tried in the State where the crime has been committed, but *when not committed within any State* the trial shall be at such place or places as the Congress may by law direct."

Article 15 of the Constitution provides:

> "That in all orginal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, etc."

The offense charged in this indictment is a conspiracy under Section 5440, Revised Statutes; that is, having conspired to do an unlawful act against the United States, and any one or more of such parties do any act to effect the object of conspiracy, all of the parties shall be guilty of the offense.

There is no sufficient proof that an offense was committed in the district as laid in the indictment. There is not sufficient proof that the defendants or either of them entered into a conspiracy, as alleged in indictment.

In the case of the United States *vs.* Warner 17, Fed R., 145, it is held that a conspiracy is an agreement between two or more by concerted actions to do some unlawful act. *There should be proof that the act was done by concerted action as between the parties of this indictment*, for a criminal conspiracy consists not mainly in the intention of the two or more to do an unlawful act, but it must be proven beyond a reasonable doubt that there was an agreement by concerted action to do the particular unlawful act complained of.

See,

Russell on Crimes, Section 116.
1 Wharton Crim. Law, 3 Ed., 1342, etc.
2 Bishop's Crime. Law, 6 Ed., 186.

An agreement is an act in the advancement of the intent of each. See.

69 American Dec., 321.
Alderman vs. People, 4th Mich., 414.
U. S. vs. Johnston, 26 Fed. R., 682.

We submit that a conspiracy can not be established by imagination; there must be proof. Proof that persons may have engaged in an unlawful traffic or business does not establish an agreement to violate a law of the United States, and such grievances can only take place when it is a fair deduction of the proof adduced.

There is no better settled principle of law than that mere passive cognizance of fraud or the illegal actions of others is not sufficient to show conspiracy. In order to constitute this crime it is incumbent upon the Government to prove an active participation.

See,

Evans *v.* People, 90 Ill., 384.
Miles *v.* State, 58 Ala., 390.
Reg. *v.* Bang, 4 Fort & F., 389.
Comr. *v.* Barnsm, 132 Mass., 242.
U. S. *v.* Lamcost, 44 Fed. R., 896.
U. S. *v.* Johnson, 26 Fed. R., 682.
U. S. *v.* Newton, 52 Fed. R., 275.
Reg. *v.* Bolton, 12 Cox, 87.

We challenge the defendant to point to a single item of evidence showing participations as between either of the plaintiffs in error. It will be remembered that it is not sufficient to show that the parties were committing an act in violation of the laws of the United States; there must be a proof of a crime, of a concerted action; a joint action against the United States and some overt act in furtherance of this crime within the jurisdiction of the tribunal to give it jurisdiction.

See,

U. S. *v.* Miller, 3 Hughes, C. C., 553.
U. S. *v.* Donan, 11 Blatchford, C. C., 168.

Newman *v.* Jenkins, 26 Pa. St., 159.
U. S. *v.* Matthews, 29 Fed. R., 702.
U. S. *v.* Weston, 17 Fed. Rep., 145.
U. S. *v.* Barrett, 65 Fed. R., 62, 63.

There is not in all the proof a single item of testimony that Reilley ever spoke to Edgar; that Reilley had ever seen or talked with Hoff; or that either of the defendants ever knew or had any dealings with the other. The only paper writing offered in evidence, as a ticket, and claimed in the indictment to represent a ticket, was a paper made of numbers placed thereon by the man Harrison, claiming that it contained the numbers that he bet upon in the policy game, and if such numbers came out in the policy game he was a winner; if not, he was a loser.

That Reilley, Hoff, Edgar or Francis had anything to do with getting up that paper writing, it is not claimed.

If it was accepted as a bet, then it was not a ticket; if it was made by Harrison and not sold by Hoff, then the conspiracy alleged in the indictment falls to the ground.

For this reason alone we are of the opinion that for absolute want of proof to sustain any part of the indictment the judgment should be wholly set aside.

## Error Claimed in the Admission of Testimony.

The testimony of A. L. France, as appears more fully on pages 40, 41, 42, 43, 44, 45 and 46 of the Record, was clearly incompetent. That a lottery business may have been carried on twenty-five or thirty years ago and then abandoned for a policy scheme and carried on by the witness up to a period of time about four years before the offense alleged against the defendants, was, in our judgment, incompetent evidence relating to, or affecting the defendants in this case.

The witness expressly states that he had no knowledge for a period of over four years of the policy business, either

directly or indirectly, whether the same was being carried on or not.

To claim that because it had been carried on four years before the alleged offense, was proof that it was still being carried on, we do not understand any rule of evidence that will support.

To say that the business that was at present carried on was a scheme practically like that which was carried four years ago, is an attempt to prove the defendants guilty by comparison, which we do not understand to be ever admissible as evidence.

Again, taking the rule as laid down by Caldwell, Judge, in Barton *v.* State, 18 O., pages 222 and 223:

> "It is never admissible to prove that a person has previously committed a crime of a similar character, to show that he committed the criminal act for which he is on trial."

But, in this case the evidence was not that the defendants had committed the act four years before, but forsooth, that somebody else had, to-wit, the witness, and that by an analogy, by his unlawful act committed four years ago, or circumstantial evidence would show that the defendants, or some of them, or some other people, were engaged in a scheme of like nature, we submit that the admission of such evidence is supported by no rule found anywhere in the law.

Again, on page 48 of the Record, in the testimony of Charles Pelton, it was clearly incompetent to have allowed the witness to state his conclusions, his findings, that is, the operation of his mind, without detailing the circumstances upon which he based them. For instance, on page 48 of the Record, as follows:

> "*Q.* You may state what is your source of knowledge with reference to Mr. Reilley being in the policy business.
>
> *A.* Personal observation. I speak from per-

sonal observation, every month of the five years, almost every week, seeing him at his appropriate place at certain hours, in the policy business, down to the last month."

(Counsel for the defendant moves the Court to strike out the whole answer of the witness; the Court overrules the motion, to which ruling of the Court counsel, for the defendants at the time excepted).

"*Q.* Do you know John Edgar?
"*A.* Yes, sir.
"*Q.* How long have you known him?
"*A.* Five years.
"*Q.* What is his business?
"*A.* He is a policy carrier from Newport; a canvasser of the books when they come in from the shops twice a day to headquarters over Mr. Rielley's shop.
"*Q.* Where is the headquarters?
"*A.* In the adjoining building to Mr. Rielley's shop; having connection up to last October through a hole in the brick wall; the only safe on the premises being in Mr. Reilley's shop.
"*Q.* How did they enter this room?
"*A.* They generally come into Mr. Reilley's first and the books were delivered there—I should not say that last, because I was not personally cognizant of that."

But there is perhaps another serious objection to all this testimony, and this question will be presented all along through the testimony, to-wit; that the acts and declarations of a conspirator can only be introduced after sufficient proof of the conspiracy as evidence against the alleged fellow conspirator, *and subject always to the limitation that the acts and declarations admitted be those only which were made and done during the pendency of the criminal enterprise and in furtherance of the common object.*

Where the acts are mere naratives of past occurences they cannot be received as evidence of such occurences. In order

to be competent testimony they must be concomitant with the particular act and connected with it so as to constitute a part of the *res gesta*.

See,

1st Greenleaf Ev., 140.
U. S. *v.* Goody, 12 Wheat., 460.
Am. Fr. Co., *v.* U. S., 2 Peters, 358.
Steatson *v.* Bank of N. O., 2 O. S., 167
Fauts *v.* State, 7 O. S., 471.
Closson *v.* State, 14 O. S., 234.
Rennaker *v.* State, 25 O. S.
Owens *v.* State, 46 O. S., 457.

No limitation is placed upon the evidence, its effect, its character or its weight as against the defendant John Edgar, John Francis, or Anthony Hoff; no limitation is made as to it in testimony.

Again, on page 50 of the Record, we find the Court admits testimony in answer to this question: "This ticket I hold in my hand is what?"

*A.* "It is a policy ticked from Henry Cutter's shop, on Vine street."

The Court permits the ticket to be shown in evidence for the purpose of illustrating what is meant by what the witness speaks of as "a ticket," clearly continuing the same rule of trial by comparison. But permitting it to stand in evidence that it was a ticket from the policy shop kept by Henry Cutter, on Vine street, this question of evidence is clearly prejudicial, and we do not think should be admitted.

Again, on page 52 of the Record, at the bottom of the page, commencing with the question: "When a man goes into a vendor's shop and buys or chooses three numbers and invests ten cents, what is done by the vendor?"

(Question objected to by counsel for defendants, the Court overrules the objection, to which ruling of the Court counsel for defendants at the time excepted.)

*A.* "In all the shops, with one exception, that I am acquainted with, the patron finds a shelf or table. with such pieces of paper as the blank paper; he makes out his ticket, writing the official number of the system at the top; if it is the system that is in this case, if he wanted to bet in the Kentucky part of it he would put a "K" at the top, then write his three or more numbers under it and the amount paid below that, and make a duplicate of it, one he hands in with his money and the other he retains so as to compare with the official print when he returns to see if he has won. There is nothing given by the agent."

This is still going on to show, by way of comparison, not any act that was done by the defendants, or either of them, not any act that was done during the pendency of the alleged criminal enterprise, or in furtherance of the common object, certainly such testimony should not be supported as a part of the *res gesta*, nor should it be claimed, under any circumstances, that it was an act concomitant with the principal act. It might be claimed that it was a wholesale way of describing how policy was played, but that was not the offense charged against the defendants in this case. The offense charged was that they had unlawfully conspired together in violation of Section 5440 of the Revised Statutes of the United States to carry tickets contrary to the provisions of the Statutes found in Vol. 8 of the United States Statutes at large, as we shall claim later on, this very testimony—if it counts for anything, if it was considered for any purpose—clearly shows, taken in connection with the testimony of France, a variance as between the proof and the allegations of this indictment.

Again, on page 53 of the Record, commencing with the question, "State what you know about Mr. Hoff in reference

to the policy game?" and on pages 54 and 55 the testimony relating to the defendant Hoff was clearly incompetent, at least it was incompetent as against the defendants Francis, Reilley and Edgar, yet no limitation was placed thereon.

Again, on page 55 of the Record, commencing with the second question thereon, and all of page 56 and down to the middle of page 57 of the Record was clearly incompetent in so far as the same related in any way to the defendant Francis.

The fact that the witness may have followed him from time to time to the place; that he undertook to describe who the other gentlemen were in the room as policy agents, etc., and that in August, 1898, a raid was made in the room and the door bursted open and three men found therein, and the statement that perhaps Mr. Francis could explain, etc., all of which testimony was clearly incompetent.

Again, on pages 57 and 58, none of these people mentioned and described were indicted, nor were the defendants, nor either of them, advised that their acts would be put in evidence, nor is it claimed that they were in any wise in a conspiracy.

Again, on pages 58 and 59, the same class of testimony is admitted, and particularly that part of it commencing about the middle of the page, describing where the official prints found in Reilley's place came from, it is all clearly incompetent.

Again, on page 61 of the Record, at the conclusion of the examination in chief, counsel for defendants moved the Court to rule out all the testimony relating to the tickets mentioned and described on pages 60 and 61 of the Record; there was no connection as between them and the defendants, or either of them, and we submit they should have been ruled out.

Again, in his cross-examination, on page 75, it is perfectly manifest that the witness knew nothing about the matter; that he was only testifying from information given him by

somebody else's surmises, and the whole of the cross-examination shows that he had no actual knowledge at all

Again, after hard struggling with this witness, on pages 79 and 80 in his re-examination, he absolutely swears that he has no knowledge of any lottery; that he never saw one; didn't know whether one existed now or ever had, and at this point we wish to say that the only evidence of a lottery in the case was the testimony of the witness Pelton, and for the want of such proof we shall claim that the prosecution must fail.

The testimony of Mr. Page, on pages 81, 82, 83 and 84, was clearly incompetent. What business the witness may have had with William C. Francis, Jr., & Co. had nothing to do with the case at bar.

The testimony of Mr. Everett, on page 90 of the Record, was clearly incompetent. The description of the man who paid him the rent, how often he paid him, etc., not being the act of the defendants or either of them, was clearly incompetent, and the Court should have sustained the motion of the counsel for the defendants below to rule out all of the testimony of said witness.

On page 93 of the Record the question is put: "When, if at any time, did you receive word whether the play you made was successful or not?" The question is objected to, and the objection overruled, and on page 94 the witness goes on to say: "I received word from Mr. Hoff the next day." As before argued and presented in full, if the offense charged was the carrying of certain things alleged in the indictment on the 4th day of October, after the offense committed as alleged in the indictment, any act of either party would be narrative of a past offense, and therefore clearly incompetent and prejudicial error as against the other defendants, and the jury should have been so instructed.

As we shall claim further along, the testimony of Mr. Harrison on pages 91 to 97 demonstrates beyond all question that

the case does not fall within the inhibition of the Act of March 2, 1895, Vol. 8, page of the Revised Statutes of the United States.

The witness explains on page 97, in answer to the question by the Court, "What did you do, and what did Mr. Hoff do upon the morning of the fourth?"—

> "*A.* Well, I left a play with Mr. Hoff.
> "The Court: Tell what you did. Don't give any conclusions.
> "*A.* Well, I played with Mr. Hoff. I made a duplicate play with Mr. Hoff on the morning of the fourth. I retained one-half and left the other with him."

And so on following down to page 98, when the question is asked, "Upon that morning when you handed Mr. Hoff the play, what else, if anything, did you hand him?" and following on with all those questions and answers relative to the paper upon which the duplicate ticket was made, etc., to all of which questions and answers the defendants by their counsel objected; the objection was overruled, and the counsel for defendants at the time excepted.

Clearly, then, if we understand the purport of the evidence given, it takes this case out of any fair construction of the Act of March 2, 1895, "That any person who shall cause to be brought into the United States from abroad for the purpose of disposing of the same, or deposit in or carry by the mails of the United States, or carry from one state to another in the United States any paper, certificate or instrument purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of a lottery, so-called gift concert or like enterprise offering prizes dependent upon lot or chance," the witness swears that Hoff was a policy vendor; that he (Harrison) made a bet with Hoff, and that he (Harrison) placed three numbers upon a piece of paper; that he duplicated those three numbers, retaining the second copy, and gave the original to Hoff as a memoranda of his play. Tak-

ing the testimony for the Government on page 45, Mr. Francis, their expert, testified that for twenty-five or thirty years there has not been any ticket or paper writing sold representing a chance in any lottery. Describing it, he goes on to say, on page 46:

> "*Q.* That he would give to the vendor such a list of numbers as he wanted to play?
> "*A.* That was the general custom, I believe.
> "*Q.* Do you mean the man that was going to play would make out that number?
> "*A.* Sometimes he did and sometimes he just gave them numbers and they put it on a piece of paper—a great many of them would not even write the numbers.
> "*Q.* And did he give any money with it?
> "*A.* I presume so.
> "*Q.* You presume so?
> "*A.* Money or credit, possibly; I don't know. I was only stating the modus operandi. I didn't see those acts myself at all; I didn't state that I saw them."

So that we do not understand that if the bet was made between Hoff and the witness Harrison, and Harrison took it upon himself to write out numbers, that that constituted a ticket issued by anybody to represent an interest, chance or share dependent upon the event of a lottery. It would be nothing more or less than a memoranda of a bet made for Harrison's convenience, and made by himself, not at the solicitation of Hoff, but on Harrison's own motion. If the strict construction contended for by the Government is applied to this act, the only person who could be guilty, in the light of the testimony, would be the man Harrison.

Again, on pages 52 and 53, in the testimony of Mr. Pelton, called as an expert by the Government, to the question, "When a man goes to a vendor's policy shop and buys or chooses three numbers and invests ten cents, what is done by the vendor?"

"*A.* In all the shops, with one exception, that I am acquainted with, the patron finds a shelf or table, with such pieces of paper as this blank paper; he makes out his ticket, writing the official number of the system at the top; if it is the system that is in this case, if he wanted to bet in the Kentucky part of it, he would put a 'K' at the top, then write his three or more numbers under it and the amount paid below that, and make a duplicate of it; one he hands in with his money and the other he retains so as to compare with the official print when he returns to see if he has won. There is nothing given by the agent."

If it is claimed that the admission of Mr. Hoff is the basis of their claim to maintain this prosecution on, to wit, the testimony detailed by Mr. Pelton on page 54 in answer to the question put by the Court, "Just state what you did learn from personal observation from matters that came within your personal knowledge."

"*A.* I accompanied two officers who visited Mr. Hoff's shop about 11 o'clock, October 4th, last, where we found official prints, quite a package of them, and copies of policy plays, and where he admitted in my presence that he had accepted policy bets and sent them over the river to headquarters. He made this statement in my presence."

Now, then, if, in accordance with the testimony of Mr. France, it did not become a bet until the book was received at headquarters and the bet accepted, again we submit that the prosecution has failed, because there was not even a wager made.

If it is claimed that the bet was made between the vendor and Harrison, then the transaction was terminated and ended there, and the paper writing that Harrison made had no life. The whole question was a bet upon what numbers would come out in the drawing.

As was ruled in the case of France, et al. *v.* The United

States, U. S., 164, this does not come within the purview of the statute, and the indictment charged no offense.

If Harrison bet with Hoff that three certain numbers would come out at the next drawing, the bet can in no wise, if written on an hundred pieces of paper by Harrison, be construed into a ticket, for the ticket contemplated by this statute—the evil sought to be prevented—was from the persons interested in a lottery issuing any paper, certificate or instrument purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of a lottery.

But can the question as presented by the peculiar language embraced in this statute "must not the instrument upon its face purport to represent a chance, share or interest; "if it fails to do that, is it an offense within the meaning of the statute? The fact that numbers written by Harrison may have been found in the possession of Edgar, who had just walked over the bridge from Newport to Cincinnati, and that such walking over the bridge constituted carrying across from one state to another, and the only evidence in support of that being the narative statement before referred to upon the part of Hoff. furnishes no evidence of guilty knowledge upon the part of Edgar. The presumption of law is, that Edgar's act was innocent. The presumption of law is not that Edgar knew the criminal nature of the paper; he may have come in possession thereof wholly innocent, aud the burden of the proof show that he had a guilty knowledge. No presumption can arise from the mere possession.

The Court erred in refusing to rule out the testimony of police officers Hill and Fricke pursuant to motion made on page 116 as to exhibits 7, 8, 9 and 10.

The Court erred clearly in not excluding the testimony of Edward Hill on pages 116, 117, 118, 119, 120 and 121. It was practically a discussion of the court to previous business of the defendants and the number of times previously that Edgar had been arrested, matters and things which in no sense have any concern with the allegations of the indictment.

The Court erred in admitting the testimony of D. Edwin Smith as to exhibits 11, 12, 13, 14 and 15, as more fully appears on page 126 of the Record. It bore no relation to the offense charged in the indictment; it was long after the occurrence, and should be only introduced as individual acts of the defendant Hoff, and at a period of time subsequent to the time mentioned in the indictment, and therefore a distinctive offense, and not admissible as proof that he committed the offense in question, or that either of his co-defendants had done so.

The testimony of Lieut. John Poppe, pages 130 and 131, was clearly incompetent. The Court permitted the Government to show by the witness the character of the defendant by reputation and appearances as they appeared to the witness, Poppe, and from what he saw and observed back as far as the year 1898. How this testimony could prove a conspiracy to carry tickets from Newport to Cincinnati, we do not understand. A man might keep a policy shop and yet not engage in the traffic of lottery tickets or carry the same from one state to another. To say that he was engaged in the business of writing policy, might increase the amount of prejudice against him in the minds of the jury—naturally, it would—it was, in a measure, putting his character in evidence. That he was in the policy business was no proof that he entered into a conspiracy, and such testimony could have only one object, one purpose—working prejudice in the minds of the jury against the defendant. It did not establish his guilt in one single iota.

Again, on page 146 of the testimony of Mr. Page, it appearing that several of the witnesses, employes of the Telegraph Company, had been called as witnesses by the Government concerning packages of paper writings or telegrams that were alleged to have been brought to the Western Union office by Mr. Francis, one of the defendants, on page 146, the question is put: "Mr. Page, are there any messages delivered to the Western Union Telegraph Company in this city, at about the hours of noon and 5 o'clock generally daily for transmission,

which are charged to an account and not paid for at the time?" and further on down to the conclusion of his testimony, the whole of it was incompetent down to and including page 150 or the end of his testimony, and the Court in the presence of the jury, on page 149 of the Record, put the question: "Mr. Page, two of the receivers in the employ of your company testified that the defendant, Francis, has for some time been bringing papers, rather a package, a sealed package, or sealed packages, and delivering them to the receivers, who under instructions from you as general manager, sent them up the chute to the operating room. I will ask you to tell the jury whether you know anything about that?" and then the answer thereto. Clearly the Court had no right to seek to intimidate the witness or to shatter his testimony by the fact that two receivers had testified to a statement of facts.

The question was "what was the fact within his knowledge" and such argument, particularly upon the part of the Court in the presence of the jury, we think was error.

The Court erred in refusing to exclude the testimony of the witness, J. T. Frazie, as requested by defendants below (See pages 155 to 162, inclusive).

The Court erred in admitting the testimony of J. B. Menke (See Record, page 162, in relation to Exhibit 17).

The fact that Charles Reilley may have gone upon the bond of Edgar for his appearance in the Police Court of Cincinnati on the fourth day of October, 1889, on a charge of promoting a scheme of chance was not evidence that was competent against the defendants to prove that they were engaged in the unlawful conspiracy charged in the indictment. The introduction of the bond in evidence, we submit, was prejudiced error and calculated to prejudice the defendants upon the trial below. (See Exhibit No. 17, Record, pages 229-230).

The Court erred in admitting the testimony of Exs. 6, 7, 8, 9, 10, as appears from the testimony of Mr. Bundy, pages 163 and 164, Record. There was no proof adduced identifying

them as ever having been used in any way by the defendants.

The Court erred in permitting A. L. France to give testimony as an expert (see pages 164, 165) relating to said exhibits. He expressly said he had no knowledge that in October, 1899, policy was played.

On page 166 the Court seeks to inquire as to the element of chance in policy. That was not at issue in this indictment and bore no relation thereto.

On pages 166 and 167 testimony concerning the Book, Ex. 19, was offered, and the same was admitted in evidence. There was not a particle of testimony that said book had ever been in the possession or under the control of either of the defendants, or that it had ever been seen by either of them, or had anything to do with the case except by way of imagination, and was, we think, incompetent.

Again, this book was found in 1898, two years before the commission of the alleged offense, and was in the custody of Police and District Attorney. Upon what theory this book could be used as evidence against an alleged conspiracy committed in October, 1899, we are at a loss to understand. The claim of the Government was that it explained the cipher telegrams. But how could that be, when the Government had possession thereof? Where is the testimony that it bore any relation to same? (See testimony, Record, pp. 168, 169 and 170).

The Court erred in permitting the examination of the witness William Fellows, pages 180, 181, 182, 183, 184 and 187, as to the cipher telegrams, because they were not sufficiently identified, and bore no relation to the case on trial. On pages 187, 188, 189 and 190, the Government again recalled the witness A. L. France, and sought to introduce the business engaged in and conducted by various parties not named in the indictment, not connected with the defendants named below, and without a single item of evidence showing any relation as

between Ben. Holland, R. B. Spencer or Henry Meyer. We think this was incompetent testimony, and should have been excluded.

On pages 188, 189, 190 and 191, the Court permitted A. L. France to give his opinion as to what the alleged cipher telegrams purported to be. There was no sufficient proof given that he had ever seen them, or any of a like character, prior or subsequent; he could not tell the jury what they contained; his testimony was a mere surmise based upon imagination. The witness admitted that he was unable to give the meaning of a single word, and the testimony, we think, should have been excluded.

TheCourt erred in refusing to exclude the testimony of Emig, on page 194, and, we think, erred in admitting the telegrams, as shown by Ex. 18. (See p. 194, Record.)

The Court in its charge to the jury goes on to define circumstantial evidence, and to give an illusrration as to what is meant and when the inference of guilty may be drawn, we do not think the rule is correctly stated

The Court leaves out the only essential element that the possession was very recent, and that the accused failed to give a satisfactory account of the possession, etc. (See on page 198 and 199). The Court assumes as a matter of fact that there was a lottery. This should be proven beyond a reasonable doubt; it is an essential element of the crime charged.

The Court, on p. 199, directly calls the attention of the jury to the previous arrest of Reilley in May, 1898, and directs practically from that the jury may infer he was engaged in the lottery business.

Again, on page 199, the Court puts the lottery as being carried on at room 64, St. Paul Building and without any proof, either directly or indirectly, of the fact, and practically calls the attention of the jury that the defendant, Francis, has charge of this lottery. The portion of the charge, following what the Court seems to be pleased to look upon as the part each played in carrying on the lottery or policy business, as

found on pages 198, 199 and 200.

The Court goes on to tell the jury what would be sufficient to convict of the conspiracy charged in the indictment. We think the Court misled the jury, and did not fully and clearly define the Law of Conspiracy. Granting that Francis did carry cipher messages to the telegraph office, that such cipher messages did relate to sending information all over the country, that certain numbers had been drawn, that act bore no relation to the conspiracy charges in this indictment.

The defendants might have engaged in the policy or lottery business, and each play his part without offending against the the statute, the gist of which was "the carrying of a ticket from one State to another."

The Court in its charge (see page 201, commencing with the second line of record):

> "If he knows there is a combination to do an unlawful act, to commit a crime, and that he has a part in it to play, and that there are others playing parts, and that others must play parts in order to accomplish the conspiracy, he is as guilty as if he knew the name, and had personal acquaintance with every one connected with the conspiracy *as if he knew precisely the part which every other man played.*"

Now, it was manifest from the testimony that Francis had no acquaintance with Hoff, Reilley, or Edgar; in fact, so far as the proof goes, he was a total stranger to them or either of them.

Why should he know that Edgar was to carry a ticket from Newport to Cincinnati? The proof does not show that it was any part of the business. Surely the business, as described by France, by Pelton and Harrison, was carried on entirely without such so called tickets. But, the Court follows, we think, with a misleading charge:

> "In a combination in which the co-operation of many numbers is necessary, covering a large field of territory, it would be impossible almost, that each

should know every other, and the part he plays. It is only necessary that he should know that there is a combination of which he is a part for the purpose of accomplishing a crime."

The fact that many persons in different States may have been engaged in this policy business, the jury might fairly assume made them co-conspirative, under this charge.

But before passing to that, there are some other matters I desire to call your attention to. Did these papers, or so called lottery tickets, which it is alleged defendants conspired to carry from Kentucky to Ohio, purport to represent interests of players in a drawing afterwards to take place? It is not necessary, gentlemen, that they should purport or show upon their face that they were tickets in a lottery giving an interest to the holder, in a drawing afterwards to take place, but their purport may be shown outside the papers. Now as to the evidence offered by the Govarnment upon that point, you will recall the evidence of France, who was introduced asan expert, to tell what they were, and the evidence of Harrison. that he wrote out his ticket and delivered one half of it to the agent, paid his money and held the duplicate—one of the duplicates, his evidence of the interest he had in the drawing that was to come off that day, and the evidence to which I have before referred as to the fact that the duplicate left with Hoff was afterwards found in possession of Edgar at the end of the bridge shortly after the play was made. If, from these facts, you are satisfied that it represented an interest in the drawing afterwards to take place, then, within the meaning of the law, it purported to represent the interest of the player in the drawing, although it did not so state upon its face.

This portion of the charge, we think, was clearly erroneous. Under the testimony of France, Pelton and Harrison, it seems perfectly clear that the paper written by Harrison, was no essential part of the play. that he could have orally declared he intended to bet on 10, 20 and 30, as illustrated by the witnesses, and paid his money; and his so declaring to the ven-

dor would have been a bet, as interpreted by the experts. So that the paper writing made by Harrison was not an act of the vendor, was not an act of Hoff, was not an act of Francis, nor was it an act of Reilley. Yet it is charged as the very overt act in the indictment that they had conspired to commit, a thing which only had existence in the mind of Harrison, and which was carried out by Harrison, the witness upon the part of the State, without any co-operation or assistance or knowledge upon the part of either of the defendants. Clearly, then, this was not an offense within the purview of the statute; clearly it is not proven that there was a conspiracy entered into by the defendants, with Harrison co-operating in any way; clearly it was not a ticket purporting to represent an interest in the lottery; for whether he had the paper or had it not, his bet, according to all the testimony, was upon the event as to whether or not the numbers named would come out in the drawing. For these reasons we submit that this part of the charge is certainly clearly erroneous.

The Court goes on again (on page 201 and 205 of the Record):

Now, then, to come to the act which it is alleged was done in furtherance of this conspiracy. There is evidence to show that five tickets, copies of which are set forth in the indictment, were, in fact, carried across the bridge from Newport, Kentucky, to Cincinnati, Ohio. That was an act to effect the purpose and object of the conspiracy. And if the jury, upon this evidence, should find that Edgar was a party to the alleged conspiracy, and carried these tickets, including the Harrison ticket, over the bridge from Kentucky to Ohio then I charge you that it would be an act in furtherance of the conspiracy, and it would be the act not only of Edgar, but of all the defendants; that is, if you find these four defendants were parties to the conspiracy charged in the indictment, to carry tickets across the bridge into Ohio, and that Edgar, one of them, did carry them over for the purposes of the lottery, in pursu-

ance of that understanding among them, then his act was an act of all four—the act of all.

This charge was misleading in several ways, and was not, we think, good law. There was not a particle of testimony that any of the paper writings mentioned in the indictment, except that which was written out by Harrison, had ever been played or attempted to be played by anybody. The five papers with numbers upon, assumed by the Court in its charge to be tickets, may have been, as described by the witness France, nothing whatever but the making of a paper without ever having been played or intended to be played. (See his testimony, page 169 of the Record).

And, in conjunction with the tickets mentioned, the Court goes on to say (including the Harrison ticket): over the bridge from Kentucky to Ohio; then I charge you "that it would be an act in furtherance of the conspiracy," etc. There is not a particle of proof that the defendants had conspired with Harrison or had any connection. It is clear that he was a hired detective seeking to prosecute them. The paper writing was of his own making, without any preconcerted action, and, therefore, it could have been no component part of a federation or conspiracy with the defendants. For this reason we think the *judgment below should be reversed.*

It is a settled rule of law that all evidentiary facts must be proved, and the existence of none of them can be presumed·

(Rule 3, p. 733, Burrill on Circumstantial Evidence).

Again, we think the Court erred in its charge upon the question of venue, as found upon page 202 of the Record.

When a man is charged with crime, gentlemen, and placed on trial, the presumption of law is that he is innocent, and before the jury would be warranted in finding him guilty of the charge upon which he is tried, the prosecution must establish his guilt beyond a reasonable doubt.

I have recited in your hearing the elements constituting the

charge in this case. Each element is essential to the charge. These elements of the charge must be established beyond a reasonable doubt in order to warrant a conviction.

We contend, that, under the Constitution of the United States such trial shall be held in the state where the said crime shall have been committed. The Court seems to have lost sight, in its charge to the jury, what was the ofiense of conspiracy, and what constituted its gist, and throughout his charge seems to have led the jury to think that the carrying of the tickets was the chief element of the crime.

If an illegal conspiracy be entered into within the limits of the United States, and within the jurisdiction of the Court, the crime is complete, and the subsequent act in pursuance thereof may be done anywhere.

(See Dealy *v.* U. S., 539.)

## Language of Indictment.

It implies that the act was one contemplated by the conspiracy "according to" and was done in carrying out "in pursuance of" something which the conspiracy provided should be done—something which, when done, would tend to accomplish the purpose of the conspiracy.

(See Dealy *v.* U. S., 546.)

In pursuance thereof may have been done anywhere.

Justice Brewer. in giving the opinion of the Court (Dealy *v.* U. S., 152 U. S., 547), says : "The gist of the offense is the conspiracy."

As said by Justice Wood (in U. S. *v.* Britton, 108 U. S., 199—204): "This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone."

The provision of the statute that there must be an act done to effect the object of the conspiracy, merely affords a *locus*

*penetentiae*, so that, before the act done, either one or all of the parties may abandon their design. and thus avoid the penalty prescribed by statute."

Hence, if the conspiracy "was entered into within the limits of the United States and the jurisdiction of the Court, the crime was then complete and the subsequent overt act."

The charge of the Court upon the subject of a reasonable doubt, as found upon pages 202 and 203, with due respect to the Court below, seems to have been a direction to the jury in plain words that, in this case, any doubt that might have been raised in their minds would be an unreasonable doubt. We think the question should have been fairly left to the jury to determine, after looking into all the evidence. If that satisfied them of the defendants' guilt to so say. But, if not fully satisfied, but found there was only strong probabilities of guilt, they should have acquitted. But to tell the jury a reasonable doubt is a reasonable doubt is no fair way of presenting the matter to a jury. For it is laid down as an established rule in all the text books that, if the facts tending to show guilt may be fairly all reconciled with innocence, it is the duty of the jury to acquit; and the jury may readily have been mislead by the language of the Court below in his charge: "In the practical illustration of justice it is imposfible to remove all doubt of the guilt of the accused." "It would defeat the ends of justice to require anything of that kind."

Respectfully submitted,

MILLER OUTCALT,
THOMAS F SHAY,
*Attorneys for Petitioners.*

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Nos. 106 & 2

Br. of Atty. Gen. (Clerk) for Appellee.

Filed Feb. 23, 1901.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk.

# In the Supreme Court of the United States.

OCTOBER TERM, 1900.

CHARLES F. CHAMPION, APPELLANT,
v.
JOHN C. AMES, UNITED STATES MARSHAL. } No. 106.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

## BRIEF OF APPELLEE.

JAMES M. BECK,
*Assistant Attorney-General.*

# In the Supreme Court of the United States.

OCTOBER TERM, 1900.

CHARLES F. CHAMPION, APPELLANT,
*v.*
JOHN C. AMES, UNITED STATES MARSHAL. } No. 106.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

## BRIEF OF APPELLEE.

### STATEMENT.

This is an appeal by the appellant from an order of the circuit court, discharging an application, previously made by the appellant, for a writ of habeas corpus, and remanding him to the custody of the United States Marshal for the northern district of Illinois. The appellant had been committed on June 22, 1899, by a United States commissioner in default of bail to answer an indictment then pending against him in the district court of the United States for the northern district of Texas, under a complaint dated May 9, 1899, which charged the appellant and one Charles B. Park with conspiring to commit an offense against the United States, to wit, did cause to be carried from the State of Texas

to other *States*, by express, lottery tickets and advertisements of a lottery, in violation of the act of Congress passed March 2, 1895. The complaint will be found on folio pages 14 to 26, inclusive, of the record. It avers, in substance, that the said Charles F. Champion (the appellant), W. F. Champion, and Charles B. Park did then and there unlawfully, knowingly, and feloniously conspire together to commit an offense against the United States, to wit, for the purpose of disposing of the same, to cause to be carried from one State to another in the United States, to wit, from Dallas, in the State of Texas, to Fresno, in the State of California, certain papers, certificates, and instruments purporting to be and representing tickets, as they then and there well knew, chances, shares, and interests in and dependent upon the event of a lottery thereafter to take place, offering prizes dependent upon lot and chance, etc. The overt act is thereupon charged as follows:

> And the said complainant aforesaid on his oath aforesaid does further state that, in pursuance of said conspiracy and to effect the object thereof, to wit, for the purpose of causing to be carried from one State to another in the United States, to wit, from the State of Texas to the State of California aforesaid, for the purpose of disposing of the same, papers, certificates, and instruments purporting to be and representing tickets, chances, and shares and interests in and dependent upon the event of a lottery, to wit, the Pan-American Lottery Company, offering prizes dependent upon lot and chance, as afore-

said, as they then and there well knew, said C. F. Champion, alias W. W. Ogden, W. F. Champion, and Charles B. Park did then and there, to wit, on or about the day last aforesaid, in the year 1899, in the county of Dallas aforesaid, in the Dallas division of the northern district of Texas aforesaid, unlawfully, knowingly, and feloniously, for the purpose of being carried from one State to another in the United States, to wit, from Dallas, in the State of Texas, to Fresno, in the State of California, for the purpose of disposing of the same, *deposit and cause to be deposited and shipped and carried with and by the Wells-Fargo Express Company, a corporation engaged in carrying freight and packages from station to station along and over lines of railway and from Dallas, Texas, to Fresno, California, for hire,* one certain box or package containing, among other things, two whole tickets or papers or certificates of said purported Pan-American Lottery Company, one of which said whole tickets is attached to and made a part of page three of Exhibit A, hereto attached, and the other said whole ticket being like the one aforesaid attached to Exhibit A in all particulars except that it differs in numbers * * * and said box so containing the said certificates or tickets being addressed and consigned by the said C. F. Champion alias W. W. Ogden, W. F. Champion, and Charles B. Park to James A. Ward, Fresno, California, which was so addressed and so deposited with the said express company for the purpose of being carried from Dallas, in the State of Texas, to Fresno, in the State of California, and there delivered to James A. Ward for

> the purpose of disposing of said above-mentioned lottery tickets, and which said tickets—wholes, halves, quarters, and eight[h]s—purported upon their face to entitle the holder thereof to so much of such prize of thirty-two thousand dollars as the denomination of such tickets might be entitled to in the event the number upon such ticket at said drawing, which purported to take place on Wednesday, March 15, 1899, should be allotted the prize, or any part thereof, according to lot or chance, the peculiar and particular manner of which is to this complainant unknown, all of which the said C. F. Champion alias W. W. Ogden, W. F. Champion, and Charles B. Park then and there well knew, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

Hearing was had on this complaint, and among other testimony a certified copy of an indictment which had been found against the defendant in the district court of the United States for the northern district of Illinois was offered in evidence, and the identity of the appellant with the defendant named in this indictment was duly proved to the satisfaction of the commissioner.

The indictment will be found in the transcript of record from folio pages 26 to 53, inclusive. It also charges as an overt act of the alleged conspiracy that the said Champion did, "for the purpose of being carried from one State to another in the United States, to wit, from Dallas, in the State of Texas, to Fresno, in the State of California, for the purpose of disposing of the same, *deposit and cause to be deposited and shipped and*

*carried with and by the Wells-Fargo Express Company, a corporation engaged in carrying freight and packages from station to station along and over lines of railway and from Dallas, Texas, to Fresno, California, for hire,* one certain box or package containing, among other things, two whole tickets or papers or certificates of said purported Pan-American Lottery Company, one of which said whole tickets is hereto annexed by the grand jury to this indictment and made a part hereof, for the reason that the same has much printed matter that is improper and too lengthy to set out in this indictment accurately, and for that reason the tickets (*sic*) is annexed hereto in its entirety."

Among the testimony offered before the United States commissioner was the lottery matter, which, it was charged in the original indictment, had been transported contrary to law. It consisted of tickets, advertisements, circular letters, official drawings, and other matter, showing the nature of the lottery and the manner in which it was conducted. The ticket, which will be found on page 71 of the record, and which may be taken as a sample, provides as follows:

PAN-AMERICAN LOTTERY COMPANY.

CAPITAL PRIZE $32,000.

**This WHOLE Ticket entitles the holder thereof to the WHOLE of such prize as may be drawn by its number in the within named drawing if presented before the expiration of three months from the date of said drawing.**

Under the last-mentioned complaint the testimony was taken by the United States commissioner, and, as

he certifies, he was satisfied "that the laws of the United States have been violated as charged in the complaint, and that there is probable cause shown to believe the defendant guilty of alleged offense." He was therefore ordered to give bond in the sum of $1,000 for his appearance before the United States district court of the northern district of Texas to answer said charge, "and that in default of same he stand committed." Whereupon the appellant filed an application for habeas corpus, which the circuit judge, on June 27, 1899, denied; whereupon this appeal was taken.

The record thus presents a single question, and that is the constitutionality of section 1 of the act of March 2, 1895. It is not questioned that sufficient testimony was offered to justify the commissioner in committing the defendant to await an order of removal if the act of Congress referred to be a constitutional exercise of power. Nor is it questioned that the acts complained of are within the meaning of the said act of Congress. (See appellant's brief filed by Moritz Rosenthal, esq., and Joseph B. David, esq., page 3.)

## ARGUMENT.

### I. HISTORY OF THE ACT OF MARCH 2, 1895.

Before passing to a discussion of the cases, it is desirable to review the history of the act of Congress under which appellant was arrested and indicted, in order that it may be clearly seen that its purpose was to prohibit such instrumentalities of commerce as express and railroad companies from transporting lottery matter.

The attempt of Congress to legislate lotteries out of existence had its commencement in the act of July 27, 1868 (15 Stat., 196), which provided, section 13, "that it shall not be lawful to deposit in a post-office, to be sent by mail, any letters or circulars concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes of any kind on any pretext whatever." This act provided no penalty, and Congress, on June 8, 1872 (17 Stat., 302), provided, section 149, "that it shall not be lawful to convey by mail, nor to deposit in a post-office to be sent by mail, any letters or circulars concerning *illegal* lotteries, so-called gift concerts, or other similar enterprises offering prizes," etc., and added a penalty for its violation.

Subsequently, by act approved July 12, 1876 (19 Stat., 90), the word "illegal" was stricken from the section, and the act of June 8, 1872, as thus amended, became section 3894 of the Revised Statutes.

The constitutionality of this act was passed upon in the case of *Ex parte Jackson* (96 U. S., 727), in a case where a letter referring to a lottery was deposited in the southern district of New York for conveyance to the town of Gloversville in the same State. The constitutionality of such legislation was challenged, on the ground that to exclude such matter from the mails was a violation of the freedom of the press. The constitutionality of the act was sustained under the authority of Congress "to establish post-offices and post-roads," and to exclude therefrom any matter deemed injurious to public morals.

By act of April 29, 1878 (20 Stat., 39), it was made illegal to conduct a lottery within the District of Columbia.

In the judgment of Congress this legislation had proved ineffectual, as many lotteries, notably the great Louisiana Lottery, were conducting extensive operations throughout the country. Deeming such legislation inimical to legitimate commerce, an act of Congress was approved September 19, 1890 (26 Stat., 465), which materially extended Revised Statutes 3894 by excluding all matter which in any manner related to the conduct of a lottery from the mails, and which authorized the Postmaster-General to return registered mail matter relating to lotteries to the writers thereof, and to refuse payment of money orders which were given in payment of chances in such lotteries. This act to a very great extent excluded the mail matter of American lottery companies from the mails, but large quantities

of such matter continued to be imported as merchandise from lottery companies in other countries, and accordingly Congress, by the act of August 27, 1894, the Wilson tariff act (28 Stat., 509), provided by section 10 "that all persons are prohibited from importing into the United States from any foreign country * * * any lottery ticket or any advertisement of any lottery. No such articles, whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles shall be proceeded against, seized, and forfeited by due course of law." To further enforce this act, sections 11 and 12 provided for the punishment of any officer, agent, or employee of the Government who shall knowingly aid or abet any person in the violation of section 10, and also for the seizure, condemnation, and destruction of the objectionable and unlawful matter.

Even this stringent legislation still proved ineffectual, notwithstanding the fact that it was supplemented by statutes of the various States, which prohibited the conduct of any lottery within their borders. The lottery companies, notably those having their home office in other countries, continued clandestinely to smuggle their lottery matter into the United States, and, as the mails were closed to them, they continued to ship as merchandise their matter through the various States by means of express companies and other common carriers of freight. It was this continued defiance of the law which led Congress to pass the act of March 2, 1895 (28 Stat., 963), and the title of the act, read in

connection with its legislative history and previous legislation, clearly shows that its principal purpose was to prohibit the conveyance of such illegal and injurious matter by means of express companies or other known instrumentalities of commerce which are engaged in interstate transportation. The material portions of the act are as follows:

> CHAP. 191.—AN ACT For the suppression of lottery traffic through national and interstate commerce and the postal service subject to the jurisdiction and laws of the United States.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, or deposited in or carried by the mails of the United States, or carried from one State to another in the United States, any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, to be brought into the United States, or deposited in or carried by the mails of the United States, or transferred from one State to another in the same, shall be punishable in the first offense by imprisonment for not more than two years or by a fine of not more than one thousand dollars, or both, and in the second and after offenses by such imprisonment only.

When this bill was before the Senate (see Congressional Record, Fifty-third Congress, second session, vol. 26, part 5, p. 4986) Senator Hoar, who had charge of the bill, said in explanation of its purposes:

> That includes every possible way in which such matters can be carried. It includes express; it includes all private means of transportation, and it also includes public methods of transportation. If the words the Senator from Kansas suggests are put in the bill, which are in effect, by any private instrumentality whatever, then he has not provided for punishing the offender if he violates the statute through a public instrumentality. So the Senator's amendment would narrow and not extend the provisions of the bill which now comprehend every possible method. The bill only enumerates the mail where it declares the mere depositing of such matter in the mails to be a felony; but the transportation clause is full and clear. I hope the Senator from Kansas will not press his amendment.

When the bill reached the House (Cong. Rec., vol. 27, p. 3013) Mr. Broderick, who had the bill in charge, made the following statement as to its purposes:

> Mr. BRODERICK. Mr. Speaker, in 1890 Congress forbade the use of the United States mails to companies and individuals for the purpose of advertising lottery schemes. That law has been evaded by using for such purposes the express, and it has been deemed necessary to amend the law so as to prohibit carrying in any way matter intended to advertise lotteries. That is the purpose of this bill.

II. JUDICIAL CONSTRUCTION.

Before passing to a discussion of the constitutionality of the act of 1895, it may be desirable to briefly review the decisions of this court and the circuit court of appeals as to the previous legislation.

The acts of Congress excluding lottery matter from the mails have been under discussion in *Ex parte Jackson*, 96 U. S., 727; *In re Rapier*, 143 U. S., 110, and *Horner* v. *United States*, No. 1, 143 U. S., 207.

In none of these cases did the question of the right to exclude lottery matter from interstate traffic under the interstate-commerce clause of the Constitution arise. All of them were cases where the United States mails, a purely governmental agency, were used as a means of conveyance, and the constitutionality of the acts was sustained on the ground that the right to establish post-offices and post-roads included the right on the part of Congress to designate what should and what should not be carried by this governmental agency. It is true that Mr. Justice Field, in *Ex parte* Jackson, did question the power of Congress to prevent the transportation as merchandise of matter which it excludes from the mails. But, apart from the fact that this expression of a doubt was purely *obiter*, and in no respect necessary to the facts of the case, it must be further remarked that it was predicated upon a case where the conveyance of the unlawful matter was purely within the borders of a State. No reference was made in the arguments and none in the opinions of the court, either in *Ex parte* Jackson or the subse-

quent cases, to the interstate-commerce clause of the Constitution, and these cases, therefore, can not be regarded as authority in the present case, except to the extent that they affirm the right of Congress to exclude matter which, in its discretion, is injurious to the public morals, and such exclusion does not abridge the freedom of the press.

The question involved in the present contention has only arisen in two cases.

In the case *France* v. *United States* (164 U. S., 676), the plaintiffs in error had been convicted under the act of March 2, 1895, for carrying certain books and papers, which showed the drawings of a lottery, which drawings had previously been made, from Covington, Ky., to Cincinnati, in the State of Ohio. Upon conviction, the defendant sued out a writ of error. This court held that the conviction could not be sustained, as the matter which the defendant transported from State to State had reference to a lottery which had already been drawn, and that the true meaning of the act was that only such matter was forbidden as related to a lottery which was to be drawn in the future. This court therefore found it unnecessary, and declined to decide the question as to the constitutionality of the act of March 2, 1895, or to intimate any opinion with respect thereto.

The only case which directly decides the question at bar is the case of *Charles W. Reilley, John Francis, Anthony Hoff, and John Edgar* v. *The United States*, decided February 12, 1901, by the Circuit Court of Appeals for the sixth circuit, and not yet reported. In

that case the plaintiffs in error were convicted in the district court for the southern district of Ohio for conspiring to violate the provisions of the act of March 2, 1895. It was shown that the defendants were acting together in what was known as the "policy" business in Cincinnati and surrounding communities, including Newport, Ky. The headquarters of the business were at Cincinnati, Ohio, and were conducted by Reilley. Edgar was a carrier for Reilley, and in the course of the business crossed from Cincinnati, Ohio, to Newport, Ky., and the policy tickets were found in his possession. Hoff wrote the policy ticket, and Francis had participated in the conspiracy to the extent that, after the drawings had been made, he had gone to the office of the Western Union Telegraph Company and telegraphed in cipher to various agencies in other States the reports of the drawing. After conviction the defendants sued out a writ of error, and contended in the appellate court that the act of March 2, 1895, was unconstitutional. The Circuit Court of Appeals, however, affirmed the constitutionality of the act and sustained the conviction in an opinion which is printed as part of appendix. (See *infra*, page 65.)

The only authority upon the precise question, therefore, sustained the contention of the Government. The correctness of this decision is now *challenged*. The importance of the question thus involved can not be readily overestimated, for, apart from the immense importance to the Government of excluding from the channels of interstate traffic matter which Congress

deems to be demoralizing to the commercial interests of the United States, the question involves the length and breadth of the commercial power of the Union, a power without which the Republic would not have come into existence, or continue to be. There are numerous decisions as to that which States may not do in regulating interstate commerce, but there are few decisions which define the power of Congress to regulate commerce with foreign countries and between the States. The length and breadth of this power seems to be involved to some extent in the present discussion, and this would seem to justify a full discussion of a question of such great importance.

I shall argue in favor of the constitutionality of the act on three grounds:

(1) That lottery tickets and shares are articles of commerce within the meaning of paragraph 3, section 8, Article I of the Constitution.

(2) That as express companies, when engaged in interstate traffic, are known instrumentalities of commerce, such express companies can be forbidden from transporting lottery matter from State to State.

(3) That even if lottery tickets be not articles of commerce, yet, if Congress was of opinion that their importation into this country, or their purchase and sale between citizens of the various States and transportation from State to State, was injurious to interstate commerce, the power to regulate such legitimate interstate commerce includes the power to suppress, when interstate, the traffic in lottery matter, which, even if it

be not interstate commerce, is yet detrimental to such commerce, and such an act of Congress would be constitutional.

### III. LOTTERY SHARES ARTICLES OF COMMERCE.

**Lottery tickets are articles of commerce within the meaning of paragraph 3, section 8, Article I, of the Constitution.**

In construing this important clause of the Constitution it is necessary to determine what was in the minds of its framers. Did they regard lottery tickets as articles of commerce? If they did such articles are necessarily included within the interstate-commerce clause of the Constitution when conveyed from State to State or imported from a foreign country. The present attitude of the public mind with respect to lotteries must not be confused with that which prevailed at the time the Constitution was adopted. Under the force of various prohibitive statutes lottery shares have ceased to a very large extent to be a commodity which is bought and sold in this country, although, as the facts in the present case show us, they are still the subject of purchase and sale and conveyance. Whatever may be the comparative disuse of lotteries in this country—and it has only been within the last ten years that the purchase and sale of lottery tickets have ceased to be frequent, and then only by virtue of sternly repressive legislation by both the States and the nation—it is a matter of common knowledge that, even at this day, lottery tickets are the subjects of purchase and sale in nearly all the countries of the world, and have received the legal sanction of many civilized

governments. Nearly all the countries of the Latin races use lotteries, not only as a means of diversion, but as a means whereby the inequalities of life are occasionally equalized by the drawing of lots. The recent International Exposition at Paris, which fittingly closed the nineteenth century, was, in part, built by a national lottery, which was sanctioned by the French Government, and the same Government has repeatedly authorized lotteries for the purpose of raising funds to construct the Panama Canal. The fact that our country and the various States have seen fit to make that illegal which was before legal can not in any way affect the character of lottery tickets as articles which have been for centuries the subject of purchase and sale. Whether an article is or is not an article of commerce is dependent, not upon the question of its noxiousness or usefulness, nor upon the question whether the States have prohibited it within their borders in the exercise of their police power, but upon the fact as to whether such articles have been, in the ordinary and usual channels of trade, the subjects of purchase and sale. It is not a question of opinion as to its utility or morality. It is a question of fact. Any article that men buy or sell is an article of commerce, and as such within the power of Congress when its exchange is interstate in its character. A State has the right under the reserved police power to protect its citizens against injury or fraudulent sales, even by excluding articles of commerce. High explosives or unwholesome articles of food are articles

of commerce, but as their introduction into a State may endanger the lives and comfort of the citizens, the method of such introduction may be regulated by State legislation, where such legislation is plainly within the legitimate ends of the police power. But such regulation does not make the article less an article of commerce. The introduction of dynamite may be regulated to an extent which is practically exclusive, but dynamite is none the less an article of commerce. Putrid meat is an article of commerce. It is bought and sold as a fertilizer or as a material for soap. It is not, however, fit for food, and any State legislation regulating its introduction into the State, while valid as an exercise of the police power, can not make it less an article of commerce. It is true that this court has at times spoken of such articles as not articles of commerce, but it only meant by such expressions to mean that such articles, which endanger the lives and comfort of citizens, have no commercial rights superior to the police power of the State. The only test as to whether a given article is an article of commerce, is whether it is, or has been, customarily the subject of purchase and sale, and this must be determined by considering whether such an article is recognized as a subject of purchase and sale by the commercial world.

> That ardent spirits, etc., distilled liquors, ale and beer are subjects of exchange, barter and traffic like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws

> of Congress and the decisions of the courts, it is not denied. Being thus articles of commerce, can a State, in the absence of legislation on the part of Congress, prohibit their importation from abroad or from a sister State? * * *
>
> Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we can not hold that any articles which Congress recognizes as subjects of inter-State commerce are not such, or that whatever are thus recognized can be controlled by State laws amounting to regulations while they retain that character; although at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. (*Leisy* v. *Hardin*, 135 U. S., 100.)

The question therefore occurs whether lottery tickets have been, or are, commodities which are ordinarily bought and sold in the commercial world. It was said in the case of *Schollenberger* v. *Pennsylvania* (171 U. S., 1, 7, and 8):

> In the examination of this subject the first question to be considered is whether oleomargarine is an article of commerce? No affirmative evidence from witnesses called to the stand and speaking directly to that subject is found in the record. We must necessarily determine the *question* with reference to those facts which are so well and universally known that courts will take notice of them without particular proof being adduced in regard to them, and also by reference to those dealings of the commercial world which are of like notoriety.

It is a fact of common notoriety that, from the beginning of the Republic to the present day, lottery tickets have been the subject of universal purchase and sale in this and all civilized countries. If further proof is needed than our common knowledge, the statutes of the United States and the decisions of the courts afford ample corroboration of this fact. Indeed, the very legislation which the court is now considering seems to be proof that the purchase and sale of lottery tickets—which are *mala prohibita* and not *mala in se*—had become so extensive as to be demoralizing to legitimate business and public morals and to call for sternly repressive legislation. As such purchase and sale are not intrinsically wrong, and as governments should not restrain the right to buy and sell, except upon grave cause, it is to be assumed that the legislation which is upon the statute books of every State, and upon the statute books of the Government, would not exist had not the buying and selling of lottery tickets reached proportions which make such barter and sale an evil of great magnitude.

It is also a fair inference that the legislation which prevailed both in State and nation in the last century and at the beginning of the present, and which almost uniformly authorized such lotteries for all purposes, public and private, *religious, political, and philanthropic*, carries with it a recognition that at that time lottery tickets were recognized as a proper and legitimate subject of purchase and sale. To the Fathers who framed the Constitution the purchase of lottery tickets was a matter of everyday occurrence and

carried with it no moral reflection whatever. Such lotteries were conducted by distinguished officials, authorized by laws, and sanctified even to sacred uses, for it is a matter of common knowledge that not merely public works, such as canals, bridges, public buildings, and schoolhouses, but also churches were built by means of lotteries. For example, the steeple of Christ Church in Philadelphia was built by a lottery in which pulpit and pew were alike engaged. Thus the first American Congress provided (see 2 Stat., 726) that the corporation of the city of Washington shall have full power to authorize the drawing of lotteries for effecting any important improvement in the city which the ordinary funds or revenue thereof will not accomplish: provided, that the object for which the money is intended to be raised is first submitted to the President of the United States and shall be approved by him. Under this act of Congress ten successive lotteries were annually held by the Government from 1812 to 1821, and in all of them the President of the United States was a participant to the extent that the purposes for which the money was thus raised were submitted to and approved by him. It is a great mistake to suppose that a lottery ticket conveyed no right of action or property interest. Whatever *is the present* effect upon such commercial commodities of restrictive legislation, they formerly conveyed unquestioned property rights which could be enforced in courts of law. Thus, in *Clark* v. *The Mayor of the City of Washington* (12 Wheat., 40), one Clark, who had purchased a lottery ticket in one of the lotteries

provided by the act of Congress already cited, sued the mayor of the city of Washington in his official capacity for the amount of the prize which his ticket had drawn. In 1818 the corporation of the city of Washington had sold the right to draw the lottery to one David Gillespie, who, in turn, issued the ticket to the plaintiff, Clark, and upon the failure of Gillespie to pay Clark the amount of the prize, the question arose as to whether the city of Washington was responsible. It was held, in an opinion of Chief Justice Marshall, that the city was responsible. In the course of his opinion the learned Chief Justice refers to the management of the lottery as "a trust, and an important trust." He adds:

> Had the managers, instead of selling the whole scheme in mass, sold the tickets in the usual manner, and received the purchase-money of the several tickets, instead of a sum in gross, for the use of the city, this question could not have arisen. No person would have denied the liability of the corporation.

In 1776 the young Republic attempted to raise money to clothe her ragged Continentals by a lottery, and the Philadelphia journals of January 11, 1777, contain the official advertisements, showing that this lottery, called "The United States Lottery," would contain 42,317 prizes and 57,683 blanks. In a postscript we are told that "this lottery was set on foot by a resolution of Congress, passed at Philadelphia the 18th day of November, 1776, for the sole purpose of raising a sum of money for carrying on the present

just war, undertaken in defense of the rights and liberties of America, in which every individual and posterity will be so deeply interested. It is not doubted but every real friend to his country will most cheerfully become an adventurer, and that the sale of the tickets will be very rapid, especially as even the unsuccessful adventurer will have the pleasing reflection of having contributed in a degree to the great and glorious American cause." As showing how little our fathers questioned the morality of lotteries, the following section from the Maryland Journal of April 29, 1780, may be quoted:

> The following proposal for raising a sum of money to be applied toward building a new church in St. Paul's parish, in Baltimore town, are offered to the public, and it is hoped the good purposes expected from the sacred institution which carries to all the Divine blessing, independent of the advantageous terms offered to the adventurer, will be a sufficient inducement for a speedy sale of the tickets.
>
> Thirty-eight hundred and thirty-seven prizes, amounting to $320,000; 8,163 blanks; 12,000 tickets at $40 each. The prospect of pecuniary success to the purchaser from the above scheme is sufficiently apparent, there being but little more than two blanks to a prize. "He who giveth to the poor lendeth to the Lord."

If it be necessary to convince the court as to the extensive use of lotteries for commercial and philanthropic purposes, I beg reference to the very interesting communication addressed by Thomas Jefferson,

in the last days of his life, to the legislature of Virginia, to be found in his collected works, Volume IX, page 500. Jefferson was then a very old man, and had become impoverished by unwise indorsements of other people's obligations. His sole resources consisted in valuable lands in Virginia, including Monticello, for which no purchaser could be procured. Virginia had passed a law which prohibited the conduct of lotteries, and Jefferson addressed a communication to the legislature asking permission to conduct a lottery, in order that he might sell his lands and pay his debts. An extract from this communication is printed as an appendix to this brief, in order that the court may know the extent and varied uses for which lotteries were conducted at the time the Constitution was framed, and to prove thereby that the framers of the Constitution did not question the fact that lottery tickets were an ordinary and legitimate subject of purchase and sale. Indeed, it may be added, as illustrated by Mr. Jefferson's communication, and also by the acts of the first American Congress, already referred to, that lottery tickets were not only ordinary articles of commerce, but were a valued and recognized agency or instrumentality of commerce, whereby governments—national, State, and municipal—raised moneys for public purposes, and whereby property, otherwise unsalable, was disposed of. In the Century Dictionary, under the word "lottery," it is stated that "most of the governments of the continent of Europe have at different periods raised money for

public purposes by means of lotteries, and a small sum was raised in America during the Revolution by a lottery authorized by the Continental Congress." That this is still true of nearly all governments except our own has already been shown by reference to the French Government, and it may be added that a practical lottery used as a fiscal instrumentality by the Austrian Government as late as 1890 was under review by this court in the case of *Edward H. Horner* v. *United States* (147 U. S., 449), and held to be a lottery, notwithstanding that the purchaser received, instead of the usual ticket, a bond issued by the Empire of Austria under which he would receive the sum of 100 florins, with a possibility that it would be redeemed for a very much larger amount as a result of certain drawings. These bonds were issued by the Empire of Austria for the purpose of raising revenue for the Government and were Government obligations.

IV. THE NATURE OF A LOTTERY TICKET.

In this connection it is well to consider the exact nature of a lottery ticket. It is argued by appellant that it is not an article of commerce on the ground that it is merely the evidence of title to an intangible interest in the drawing of a lottery, or at least an executory contract whereby the holder is entitled to receive a certain sum of money upon the happening of a certain contingency.

I respectfully submit that this is too narrow a view. In considering the question it is well to distinguish between the abstract legal idea of such a ticket and its

commercial or popular nature. For commercial purposes it must be regarded in the light in which it is bought and sold. And, so viewing it, it is more than a piece of paper; it is a *thing* which not merely evidences value, but which carries value with it when bought and sold or transported. Before the drawing takes place it has value in the hands of its possessor; he can obtain value for it and such value increases or diminishes as the result of the drawing affects it. To transfer title to it requires no indorsement, and no written assignment is necessary and no consent is required to such transfer on the books of the company. It is more than a contract; more than a certificate of a share of corporate stock; more than a bond. It is the *thing* itself, which, from time immemorial, has been bought and sold and has intrinsic value as such. Thus, the present ticket says, "This whole ticket entitles the *holder* thereof to the whole of such prize," etc. As such, it was a thing of value, which passed property of value from man to man by mere physical delivery, and which was bought and sold by men as a thing of inherent value. In buying and selling such articles men are not guided by refined and metaphysical distinctions such as may trouble the legal mind, and the popular conception of a lottery ticket should determine in giving it its true character as an article of commerce. To illustrate: Suppose, at the time the State of Louisiana authorized the Louisiana Lottery to conduct its drawings that a citizen of New York should send a draft for $5,000 to purchase 1,000 tick-

ets in such lottery, and the tickets should be shipped from New Orleans to New York City and exposed by the purchaser for sale in his store as purchasable commodities. Can it be questioned that, according to the common acceptation of commerce, such purchase and sale was a commercial transaction, and that the merchandise thus shipped was a commercial shipment?

This court has not favored refined legal distinctions which attempt to destroy the nature of property. As has already been shown in the case of *Clark* v. *The City of Washington* (12 Wheat., 40), a lottery ticket has been held to be a proper subject for a suit at law and recovery therein. Similarly, in the case of *Jolly* v. *United States* (170 U. S., 402), where a man was indicted for the larceny of postage stamps under 5456 Revised Statutes, which makes it a crime to feloniously take away "any kind or description of personal property belonging to the United States," the question arose as to whether postage stamps were personal property, and the distinction now sought to be made by the appellant was then urged, that a postage stamp was but a piece of paper and not intrinsically valuable. Even in a case involving the liberty of a subject this court declined to accept this narrow view.

In the opinion of Mr. Justice Peckham, it is said:

> Postage stamps while in the hands of the Government, ready to be sold and used, are most surely its personal property. * * *
>
> There is, while the stamps are in the possession of the Government, some intrinsic value in the stamps themselves as representatives of a

certain amount of cost of material and labor, both of which have entered into the article in the process of manufacture entirely aside from any prospective value as stamps. They are incapable of being distinguished the one from the other. All postage stamps of the same denomination are alike, and the moment they are taken from the possession of the Government they are valuable in proportion to their denomination and are subject to use, the same as if they had been purchased, because it is wholly impossible for the Government to detect or identify any particular stamp as having been stolen or otherwise fraudulently put in use. Once out of the possession of the Government they may be used for their full value to obtain carriage by mail of the article to which they are affixed. There is every reason therefore why such stamps should be regarded as personal property even while in the possession of the Government. They become valuable to the amount of their denomination the very instant they get into the possession of another. They are not mere obligations, but a species of valuable property in and of themselves the moment they are out of the possession of the Government.

It is true that at common law, when larceny was punishable by death, the courts in favor of life held that only movable goods having an intrinsic value could be the subject of larceny, and not written instruments as such. But even then written instruments could be the subjects of larceny when described as a piece of paper or parchment, and the common-law definition of what

personal goods consist has been materially enlarged by various statutes. "Property" in its legal sense is the exclusive right of possessing, enjoying, and disposing of a thing (*Chicago R. R. Co.* v. *Englewood R. R. Co.*, 115 Ill., 375–385), and therefore a lottery ticket does constitute property, could at this day be the subject of larceny, and for commercial purposes is clearly an article of commerce. Only the legal profession, with its subtle distinctions, would for one moment question so obvious a fact.

Every State statute which forbids the purchase and sale of lottery tickets necessarily implies that such purchase and sale are commercial transactions. Can it be possible that Congress may not forbid the transportation of such articles of purchase and sale from State to State when the States themselves have taken sufficient cognizance of the frequency of such transactions to make them criminal offenses?

Assuming, however, that the essence of the transaction is the purchase and sale of an *interest* in a lottery, which is only evidenced by the ticket, does the transaction become less a commercial one? Does the transportation of the ticket as an incident to such commerce become less subject to the commercial power of the Union? The appellant in effect contends that there can be no interstate commerce in anything that is not visible and tangible. I can not admit this.

Certainly there is nothing in the clause of the Constitution under discussion which requires such a construction. The framers used but twenty-one words to

convey absolute and exclusive power to the Federal Government to regulate commerce between the States and with foreign nations and Indian tribes. The only word used to define the subject-matter is "commerce." None could have been used more comprehensive, for it clearly includes whatever may be the subject of purchase or sale. To argue that commerce can only consist of the purchase of tangible or visible commodities is to read a qualifying clause into the Constitution. Its language neither requires nor implies any such distinction. It embraces within its sweeping meaning whatever may be bought or sold.

In the leading case of *Gibbons* v. *Ogden* (9 Wheat., 1) the great Chief Justice gave a definition to the word "commerce" which is often quoted and has never been surpassed. The facts of this familiar case need not be mentioned except to note that it was a bill filed by Ogden against Gibbons, asserting that the said Ogden had acquired by assignment from Livingston and Fulton the exclusive *right* to navigate the waters between Elizabethtown and other places in the State of New Jersey and the city of New York, and asking that the defendant Gibbons be restrained from violating such exclusive privilege. It is to be observed, therefore, that the matter in dispute was the *abstract and exclusive right* of navigation of a tidal river, and it was contended by the appellant that such exclusive privilege was void and that it was an infringement of the exclusive power of Congress to regulate interstate commerce. This leading case, therefore, turned upon the question of an

abstract right, and not upon the actual transportation of any tangible commodity. Mr. Oakley argued that commerce is only "transportation and sale of commodities," while Mr. Emmett gave the definition as "the exchange of one thing for another, the interchange of commodities, trade, or traffic." Mr. Wirt claimed in reply that it "always implies intercommunication and *intercourse*." This last definition was adopted by the court in the oft-quoted definition of the Chief Justice, as follows:

> The subject to be regulated is commerce; and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

In his concurring opinion Justice Johnson said:

> The history of the times will, therefore, sustain the opinion, that the grant of power over commerce, if intended to be commensurate with the evils existing, and the purpose of remedying those evils, could be only commensurate with the power of the States over the subject. And this opinion is supported by a very remarkable evidence of the general understanding of the whole American people when the grant was made.

In defining commerce he says:

> Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce; the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulation. Shipbuilding, the carrying trade, and propagation of seamen, are such vital agents of commercial prosperity, that the nations which could not legislate over these subjects, would not possess power to regulate commerce.

The comprehensive definition of commerce which was thus given in *Gibbons* v. *Ogden* has never been departed from by this court, and it has been held to apply not only to the instrumentalities of commerce, but likewise to human beings themselves who were not the subject of purchase or sale. Thus, in the *Passenger cases* (7 How., 283) (argued by Webster and Choate), the health commissioners of the port of New York

placed a tax upon each cabin and steerage passenger arriving at that port from foreign countries. The whole subject of the commercial power of the Union was, as the court well knows, exhaustively reviewed by all of the justices in separate opinions, and the conclusion reached that the mere entry of passengers into a port is commerce, although such passenger may come and go without any special reference to the purchase or sale of commodities. As to what commerce is, Mr. Justice McLean says:

> Commerce is defined to be "an exchange of commodities." But this definition does not convey the full meaning of the term. It includes "navigation and intercourse." That the transportation of passengers is a part of commerce is not now an open question.

He directly negatives the suggestion that passengers not being imports their transportation therefore can not be commerce. Mr. Justice Wayne, after criticising the dictum in *City of New York* v. *Miln* (11 Pet., 102) that persons "are not the subject of commerce," reaffirms the definition of commerce contained in *Gibbons* v. *Ogden*. Mr. Justice Grier, in his opinion, argued that if the States had the power to exclude aliens one of the chief objects for which the Union was formed had totally failed, and he adds:

> Commerce, as defined by this court, means something more than traffic,—it is intercourse; and the power committed to Congress to regulate commerce is exercised by prescribing rules for carrying on that intercourse.

In *Gloucester Ferry Company* v. *Pennsylvania* (114 U. S., 196, 203), Mr. Justice Field said:

> Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged. The subjects, therefore, upon which the power may be exerted are of infinite variety. While with reference to some of them, which are local and limited in their nature or sphere of operation, the States may prescribe regulations until Congress intervenes and assumes control of them; yet, when they are national in their character, and require uniformity of regulation affecting alike all the States, the power of Congress is exclusive.

It is not alone the carriage of passengers in a boat or railroad car or other method of public or private conveyance. It has recently been held that the mere passage of foot passengers from one side of the Ohio River to the other side is commerce. In this opinion

(*Covington Bridge Company* v. *Kentucky*, 154 U. S., 204, 218) Mr. Justice Brown said:

> Commerce was defined in *Gibbons* v. *Ogden* (9 Wheat., 1, 189) to be "intercourse," and the thousands of people who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool. While the bridge company is not itself a common carrier, it affords a highway for such carriage, and a toll upon such bridge is as much a tax upon commerce as a toll upon a turnpike is a tax upon the traffic of such turnpike, or the charges upon a ferry a tax upon the commerce across a river.

It has been held, moreover, that even the invisible messages which are transmitted along telegraph lines from citizens of one State to citizens of another are commerce. In *Pensacola Telegraph Company* v. *The Western Union Telegraph Company* (96 U. S., 1) an act of Congress was under question which provided for the construction of telegraph lines. It was held to be a valid regulation of commerce and to be superior to a statute of Florida which gave to the Pensacola Telegraph Company the exclusive right of operating telegraph lines in that State. Mr. Chief Justice Waite delivered the opinion of the court, in the course of which he said:

> Since the case of *Gibbons* v. *Ogden* (9 Wheat., 1) it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress.

> Post-offices and post-roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the National Government.
>
> * * * * *
>
> The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business, and become one of the necessities of commerce. It is indispensable as a means of intercommunication, but especially is it so in commercial transactions. The statistics of the business before the recent reduction in rates show that more than 80 per cent of all the messages sent by telegraph related to commerce. Goods are sold and money paid upon telegraphic orders. Contracts are made by telegraphic correspondence, cargoes secured, and the movement of ships directed. The telegraphic announcement of the markets abroad regulates prices at home, and a prudent merchant rarely enters upon an important transaction without using the telegraph freely to secure information.

In *Western Union Telegraph Company* v. *Pendleton* (122 U. S., 347), a statute of the State of Indiana which required telegraph companies to deliver dispatches by messenger to the addressees, under certain conditions, was held to be in conflict with the interstate-commerce clause of the Constitution as an attempt to regulate the delivery of such dispatches. It was held that the authority of Congress over the subject of commerce by

telegraph was supreme. In the opinion of the court, Mr. Justice Field alludes to the fact that the telegraph messages held to be within the commercial power of the Union are invisible and intangible. He says:

> Although intercourse by telegraphic messages between the States is thus held to be interstate commerce, it differs in material particulars from that portion of commerce with foreign countries and between the States which consists in the carriage of persons and the transportation and exchange of commodities, upon which we have been so often called to pass. It differs not only in the subjects which it transmits, but in the means of transmission. *Other commerce deals only with persons, or with visible and tangible things. But the telegraph transports nothing visible and tangible; it carries only ideas, wishes, orders, and intelligence. Other commerce requires the constant attention and supervision of the carrier for the safety of the persons and property carried. The message of the telegraph passes at once beyond the control of the sender, and reaches the office to which it is sent instantaneously.* It is plain, from these essentially different characteristics, that the regulations suitable for one of these kinds of commerce would be entirely inapplicable to the other.

In *Ratterman* v. *Telegraph Company* (127 U. S., 411), and *Leloup* v. *Port of Mobile* (127 U. S., 640), the same rulings were followed. In the latter case the State of Alabama attempted to impose a license tax upon a telegraph company as a condition of doing business within its jurisdiction, although a large part of the business of

the company was the transmission of messages from one State to another, and although the company had the powers conferred by the act of Congress passed July 24, 1866. Says Mr. Justice Bradley:

> *In our opinion such a construction of the Constitution leads to the conclusion that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress. This is the result of so many recent cases that citation is hardly necessary.*

It is not merely messages in regard to business transactions that can not be taxed by the State. No interstate messages can be taxed, whatever may be their import. Among interstate telegrams there is no distinction made between commercial and noncommercial telegrams. Thus, in the Texas case above cited, the court say of a tax regulated by the number of messages sent (p. 466):

> Clearly * * * this must be a tax on the messages. As such, so far as it operates on private messages sent out of the State, it is a regulation of foreign and interstate commerce and beyond the power of the State. * * *
>
> It follows that the judgment, so far as it includes the tax on messages sent out of the State, or for the Government on public business, is erroneous.

## V. WRITTEN INSTRUMENTS WITHIN INTERSTATE COMMERCE POWER.

As further illustrating the fact that the commercial power of the Union has regard not merely to articles of commerce, but also to evidences of title with respect to such property, or to the ordinary commercial methods by which they are bought and sold and transported, I may refer to the case of *Almy* v. *California* (24 How., 169). In this case the constitutionality of a law of the State of California, which imposed a stamp tax upon certain instruments of writing, among other bills of lading for the transportation of gold or silver coin, or gold dust, or gold bars, was in question. The plaintiff in error received at San Francisco a quantity of gold dust for transportation to New York, but refused to stamp the bill of lading in conformity with the act. This court, in an opinion by Chief Justice Taney, held that the case was analogous to *Brown* v. *The State of Maryland*, where a license tax of $50 was imposed on importers of foreign commodities before they were permitted to sell goods thus imported. Following the reasoning in that case, the court held that it was impossible to distinguish between the commodity sold or transported and the bill of lading which represented it; that such a bill of lading, although only a piece of paper and an evidence of title, was, nevertheless, a necessity of commerce and could not be taxed. Says the Chief Justice:

> *But a tax or duty on a bill of lading, although differing in form from a duty on the article shipped,*

*is in substance the same thing; for a bill of lading, or some written instrument of the same import, is necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another. The necessities of commerce require it.* And it is hardly less necessary to the existence of such commerce than casks to cover tobacco, or bagging to cover cotton, when such articles are exported to a foreign country; for no one would put his property in the hands of a shipmaster without taking written evidence of its receipt on board the vessel, and the purposes for which it was placed in his hands. The merchant could not send an agent with every vessel, to inform the consignee of the cargo what articles he had shipped, and prove the contract of the master if he failed to deliver them in safety. A bill of lading, therefore, or some equivalent instrument of writing, is invariably associated with every cargo of merchandise exported to a foreign country, and consequently a duty upon that is, in substance and effect, a duty on the article exported. And if the law of California is constitutional, then every cargo of every description exported from the United States may be made to pay an export duty to the State, provided the tax is imposed in the form of a tax on the bill of lading, and this in direct opposition to the plain and express prohibition in the Constitution of the United States.

Similarly in the present case, that which was sold by the lottery company in Paraguay through an agent in Texas to the citizen of California was a property in-

terest in a joint enterprise called a lottery, which, according to commercial law, was perfectly valid. The lottery ticket which was transported was essential to this transaction of purchase and sale. As Chief Justice Taney said in *Almy* v. *The State of California*, "The necessities of commerce require it. And it is hardly less necessary to the existence of such commerce than casks to cover tobacco, or bagging to cover cotton, when such articles are exported to a foreign country." Such a ticket is more than a mere receipt for money. It is, as a bill of lading, or as a deed to real estate, the tangible, visible evidence of a property right and essential to the transaction of this class of business, for it is inconceivable that men would buy shares in a lottery upon mere oral promises and without some evidence of their legal interest in the result of the drawing. Following the reasoning in the Almy case, therefore, the ticket is as much within the commercial power of the Union as the interest that was bought and sold. Such a ticket could be resold a hundred times. It could be the subject of a suit. It has unquestioned value, and can be bought and sold as any other commodity. The reasoning of the Almy case was followed in the recent and famous case of *Pollock* v. *The Farmers' Loan and Trust Company* (157 U. S., 582, 591).

It is true that in the Almy case the decision was placed upon the mistaken ground that goods shipped from San Francisco to New York were exports. The Supreme Court in the subsequent case of *Woodruff* v. *Parham* (8 Wall., 123, 137), while sustaining the authority of *Almy* v. *The State of California*, placed it on

the true ground that the tax on the bill of lading was not void as a tax on exports, but was void as a regulation of interstate commerce, and the two cases, therefore, read together, clearly establish that a tax on a written instrument which of itself is of no intrinsic value, and which simply represents title, but which is ordinarily used in the purchase and sale and interstate transportation of commodities, is a regulation of interstate commerce, and if imposed by a State is void.

In the *Woodruff* v. *Parham* case Mr. Justice Miller says with reference to the Almy case:

> It seems to have escaped the attention of counsel on both sides, and of the chief justice who delivered the opinion, that the case was one of interstate commerce. No distinction of the kind is taken by counsel, none alluded to by the court, except in the incidental statement of the *termini* of the voyage. * * *
>
> The case, however, was well decided on the ground taken by Mr. Blair, counsel for the defendant, namely: that such a tax was a regulation of commerce, a tax imposed upon the transportation of goods from one State to another, over the high seas, in conflict with that freedom of transit of goods and persons between one State and another, which is within the rule laid down in Crandall *v.* Nevada, and with the authority of Congress to regulate commerce among the States.

It would be destructive of that power, were this not the case, as in the complicated methods of modern business a great portion of all business is done by means

of written instruments, and if the States had power to restrain, regulate, prohibit, or tax these at pleasure, they could destroy commerce itself. Take, for example, checks on banks. They are not even the evidence of title, but simply a direction to a given bank to pay certain moneys to the payee of the check. Their use has largely superseded the use of money of intrinsic value in the ordinary exchange of commodities, and it is probable that nine-tenths of all the business of the country is transacted through drafts, checks, certificates of deposit, bills of exchange, promissory notes, etc. If it be held that a lottery ticket is not an article or instrumentality of commerce, because it is intrinsically only a piece of paper, it is equally true that all other commercial instruments, such as I have named, are equally removed from the commercial powers of Congress when used in connection with interstate business. Is it possible that the whole complicated mechanism of modern business, transacted almost entirely upon paper, can, when interstate and commercial in character, be taxed to death or restrained at the will of a State legislature? Under the authority of *Almy* v. *California* this can not be done as to bills of lading, and it is impossible to distinguish in principle between a bill of lading and any other instrument of writing above mentioned, including a lottery ticket, which certainly reaches nearer to the definition of property than a promissory note, which is a mere contract, or a check, which is a mere direction upon a banker to pay. The ticket is more than a direction to pay or a receipt

for money taken. It is a visible, tangible, outward evidence of a property right which from time immemorial has been a subject of barter and sale in all civilized countries, and is more analogous to a stock certificate or bond, both of which are commonly regarded for modern commercial purposes as not only the evidence of property but property itself.

VI. THE INSURANCE CASES.

The only authorities which seem in any way to conflict with this reasoning are the insurance cases, commencing with *Paul* v. *Virginia* (8 Wall., 168), and continuing to *Hooper* v. *California* (155 U. S., 648). This is the only line wherein intercourse between persons in different States, carried on for the purpose of profit, has been held not to be commercial. It will be noticed that this court has never had the question squarely presented whether Congress may enact legislation regulating the interstate insurance business. In reading the court's opinion upon these insurance cases the question actually presented to the court must be kept in mind. (*Woodruff* v. *Parham*, 8 Wall., 123, 138.) The precise point decided is that the insurance business is not so commercial in character that a State is obliged to admit such foreign insurance corporations, although there are commercial corporations, such as express companies, which it is obliged to admit. The foundation of all these decisions was that such corporations, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created, and that, therefore, their right to do business in another

State depends upon the grace of such State, which can impose terms or restrain altogether. In the course of his opinion in *Paul* v. *Virginia* Mr. Justice Field unquestionably intimated that a policy of insurance was not a transaction of commerce. He also says, as the ground of the decision:

> *The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York while in Virginia would constitute a portion of such commerce*

This would seem to be the true ground for the decision, for when a foreign corporation secures permission to do business in another State it establishes an agency and the entire contract of insurance takes place between the agent and the insured, within the State, and the transaction, therefore, is not an interstate one.

That this is the true doctrine of this class of cases is shown by Chief Justice Waite in *Pensacola Tel. Co.* v. *Western Union Tel. Co.* (96 U. S., 1), when he said:

> We are aware that in *Paul* v. *Virginia* (8 Wall., 168) this court decided that a State might exclude a corporation of another State from its jurisdiction, and that corporations are not within the clause of the Constitution which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the

several States." Art. 4, sec. 2. *That was not, however, the case of a corporation engaged in interstate commerce; and enough was said by the court to show that, if it had been, very different questions would have been presented.*

In this connection, I beg especial reference to the learned opinion of the circuit court of appeals for the sixth circuit, which is printed as an appendix to this brief, where the true doctrine of these insurance cases is discussed by an appellate court. (See *infra*, p. 65.) Whatever be the true doctrine of these cases, it is enough to say that the lottery traffic is not analogous to insurance, as has already been shown.

Moreover, the business is not conducted, as Mr. Justice Field showed that the insurance business was conducted, practically within the limits of a single State, but may be not only interstate, but, as in the case at bar, international; and the case at bar is upon both grounds clearly distinguishable from the insurance cases, whose authority, therefore, is not necessarily in question here.

The soundness of our contention may be tested in another way, and that is by viewing the present transaction, not as interstate, but as a commercial transaction of citizens of the United States with a foreign power. It must be remembered that in this case the Pan-American Lottery Company is a corporation of Paraguay, and transacts its business through an agency in Texas, which, in turn, sells tickets to citizens of other States. If lottery business is not commercial within the meaning of the Constitution, for the purposes of

interstate traffic, it is equally true that it is not commercial for purposes of foreign commerce. If this be true, then it follows that section 10 of the act of Congress quoted at the commencement of this brief (act of August 27, 1894), which forbids the importation of lottery matter, is also unconstitutional. Can it be possible that the United States is without power to exclude the importation into the United States of lottery tickets? Indeed, it can be fairly argued that this act of Congress is a recognition that such tickets are articles of merchandise which are capable of transportation. They are treated as any other imports which are brought into a port of entry, and can be proceeded against, seized, forfeited, and destroyed under the provisions of the act mentioned. Here is a recognition that lottery matter has been the subject of our foreign commerce, and the exclusion of such matter can only be justified under the power to regulate such commerce. This, as any other right to regulate commerce, may be of value to this country. It might, for example, be a great object to the French Government to secure permission to sell the tickets of the Panama Lottery Company throughout the United States. Could not the United States admit such matter if it thought it advantageous to other interests, and if the tariff legislation of France were regarded as reciprocal?

Mr. Guthrie, in his very able brief, appreciates the force of this argument and attempts to distinguish between the power of Congress to regulate foreign commerce and interstate commerce. He concedes that Congress "may exclude persons, commodities, or printed

matter of any nature whatsoever, whether or not related to or connected with commerce." But the distinction is not well founded, for this court has decided in *Brown* v. *Houston* (114 U S., 622, 630) that "the power to regulate commerce among the several States is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations."

The case of *Cohens* v. *Virginia* (6 Wheat., 264), cited by Mr. Guthrie, does not disturb this conclusion. The question involved was not whether a lottery ticket was an article of commerce, nor was the extent of the power to regulate commerce necessarily involved in the case. Congress had authorized the city of Washington to conduct a lottery for the purpose of erecting public buildings within the District of Columbia. It was held that, under a strict construction of the grant of corporate power, no authority was given to sell the tickets outside of the city of Washington, and that, therefore, the sale in Virginia was invalid. Says Chief Justice Marshall:

> It has been held that the States can not make it unlawful to buy that which Congress has made it lawful to sell. This proposition is not denied, and therefore the validity of a law punishing a citizen of Virginia for purchasing a ticket in the city of Washington might well be drawn into question. Such a law would be a direct attempt to counteract and defeat a measure authorized by the United States. But a law to punish the sale of lottery tickets in Virginia is of a different character. Before we can

impeach its validity we must inquire whether Congress intended to empower this corporation to do any act within a State which the laws of that State might prohibit.

The court reached the conclusion that "the mind of Congress was not directed to any provision for the sale of the tickets beyond the limits of the corporation."

VII. POWER TO REGULATE INTERSTATE EXPRESS COMPANIES AS AN INSTRUMENT OF COMMERCE.

The argument has heretofore been directed to the suggestion that lottery tickets and the lottery business were commercial in their character. The constitutionality of the act need not, however, rest upon this assumption, for it can be sustained on the ground that it was a regulation of express companies, and these, being instrumentalities of commerce, are subject to Federal control.

It is true that the act of Congress does not specifically mention express companies; but the title of the act, and its body, read in connection with previous decisions and the known history of the legislation, clearly shows that the act was aimed to prevent express companies from transporting that which Congress had already excluded from the mails. (See *infra*, pp. 10, 11, 12.) In the present case the matter was transported by the Wells-Fargo Express Company, and therefore the question arises whether Congress has power to provide that no express company may transport lottery tickets from State to State.

There are certain instrumentalities of commerce which are regulated without reference to the motive or character of particular transactions. Thus, Congress, in regulating interstate telegraph companies, does not attempt to discriminate between messages which are sent for commercial purposes and those for other purposes. It would be impracticable to do so. While 80 per cent of all messages may be commercial in their character, yet a considerable percentage have no reference to commerce whatever. And yet, all messages, of whatever character, are, when interstate, subject to Federal control, on the theory that the telegraph company as a unit is an instrumentality of interstate commerce and subject to Federal control. Similarly, railroads engaged in interstate transportation are subject to like control, notwithstanding that they may carry many passengers who are traveling for pleasure and for purposes that are wholly noncommercial. Express companies have been treated likewise as a unit, and States have been compelled to permit their entry, notwithstanding that much of their business is noncommercial in its character. Similarly, in the *Passenger Cases* a State tax upon cabin and steerage passengers was held unconstitutional, and no attempt was made to discriminate between passengers who came for commercial purposes or for purely personal reasons. If an express company can compel a State to admit it without regard to the nature of its business, provided always that it is interstate, then Congress can regulate

that which an express company may transport from State to State without discriminating between the character of the matter thus transported. In other words, the jurisdiction is secured, not by reason of the character of the business in the particular case, but because the company itself is an instrumentality of commerce and subject, as a unit, to legislative control. We submit, therefore, that Congress had power to pass this act to the extent that it forbids any recognized instrumentality of commerce, such as a ship, railroad company, express company, or telegraph company, from carrying lottery matter, even though such lottery matter be not itself commercial in character. This is so fully sustained by the reasoning of this court in the class of cases referred to that citation or further comment seems unnecessary.

VIII. POWER TO PROTECT "LEGITIMATE" COMMERCE.

**(3) That even if lottery tickets be not articles of commerce, yet, if Congress was of opinion that their importation into this country, or their purchase and sale between citizens of the various States and transportation from State to State, was injurious to interstate commerce, the power to regulate such legitimate interstate commerce includes the power to suppress, when interstate, the traffic in lottery matter, which, even if it be not interstate commerce, is yet detrimental to such commerce.**

Assuming that lottery tickets or shares are not articles of commerce, and also that express companies as instrumentalities of commerce may not be prohibited from carrying lottery matter, I pass to another view of

the case in which the constitutionality of the act may, it seems to me, be justified.

What has been the purpose of the lottery legislation, State and national? Lotteries are not *mala in se*, or inherently immoral. They are *mala prohibita*, and are forbidden because of their injurious consequences upon what may be termed legitimate business and public morals. That this has been the purpose of Congress is shown by all its legislation on the subject of lotteries, for they continually refer (see R. S., 3894) to "lottery, so-called gift concert, or other similar enterprise offering prizes dependent upon lot or chance, or concerning schemes devised for the purpose of obtaining money or property under false pretenses." Later in the same act the general expression "gift enterprise" is used to include all such methods of buying or selling other commodities by the offering of prizes. The same view runs through the State statutes, and the evil aimed at was the practice of many commercial enterprises, such as tea companies, to offer prizes in connection with the sale of their commodities. Concerts would be given with prizes with every ticket, or every purchaser of a pound of tea would have the opportunity to obtain a grand piano. These methods of stimulating business were felt to be injurious to commerce, and hence this repressive legislation. If, therefore, Congress was of the opinion that the interests of legitimate interstate commerce required the prohibition of such methods, thereby

made illegitimate, would not the power to regulate legitimate commerce be fairly inclusive of the power to prohibit the illegitimate methods by lotteries, raffles, etc., when clearly interstate in its character?

If, for example, a Chicago beef company should, in selling meat throughout the United States, offer a prize for every purchase, and the possibility of a very great prize depended upon chance, would not the power to regulate interstate commerce in the meat fairly include the suppression of the method whereby such interstate commerce was conducted? That such a purpose was one of the purposes of this lottery legislation can not be questioned. Whether it was sufficient in magnitude to justify the legislation is a question for Congress, which this court would not review.

IX. POWER TO REGULATE IS POWER TO PROHIBIT.

*The power to regulate interstate or foreign commerce implies a power to prohibit such commerce in any given article.*

In *Gibbons* v. *Ogden* (9 Wheat., 1, 196), Chief Justice Marshall said:

> We are now arrived at the inquiry—what is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.

The power over interstate commerce is the same as that over foreign commerce. Both are granted in the same clause of the Constitution and in the same language. (*Gibbons* v. *Ogden*, 9 Wheat., 1, 228; *License cases*, 5 Howard, 504, 578; *Brown* v. *Houston*, 114 U. S., 622, 630; *Bowman* v. *Chicago, &c., R. R. Co.*, 125 U. S., 465, 482; *Crutcher* v. *Kentucky*, 141 U. S., 47, 58; *Pittsburg Co.* v. *Bates*, 156 U. S., 577, 587; 2 Story on the Constitution, sec. 1065.) In *Leisy* v. *Hardin* (135 U. S., 100, 108) Chief Justice Fuller said:

> The power vested in Congress "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," is the power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the Constitution.

In the exercise of its power to regulate foreign commerce Congress has never hesitated to prohibit commerce in any particular article, or even to stop foreign commerce altogether, either for a fixed period of time or indefinitely. A well-known instance of partial prohibition is that of obscene literature, which has been part of our laws ever since the tariff act of August 30, 1842 (ch. 270, sec. 28). To the latter class belong the well-known nonimportation and embargo laws of the period prior to the war of 1812. (See *Gibbons* v. *Ogden*, 9 Wheat., 1, 192–3; 2 Story on the Constitution, secs. 1264, 1289, 1290.)

Congress has the same power over interstate commerce as over commerce with the Indian tribes. The

question whether, under its power to regulate commerce with the Indian tribes, it could exclude any selected article from such commerce as deleterious, came up for decision in *United States* v. *Holliday* (3 Wall., 407, 416–418), and was decided in the affirmative in an opinion by Mr. Justice Miller. This ruling was reaffirmed in *United States* v. *43 Gallons of Whiskey* (108 U. S., 491), in an opinion by Mr. Justice Davis. Both of these cases related to the statute prohibiting the sale of spirituous liquors, whose constitutionality has since then been assumed without question. (*United States* v. *Le Bris*, 12 U. S., 278; *Sarlls* v. *United States*, 152 U. S., 570; *United States* v. *Mayrand*, 154 U. S., 552.)

If Congress can exclude obscene literature from foreign commerce, why not from interstate commerce also; and if it can exclude obscene literature, why can it not exclude lottery tickets? If it can exclude spirituous liquors from commerce with the Indian tribes, why not from interstate commerce also; and if it can exclude spirituous liquors, why can it not exclude lottery tickets?

The principle has in effect already been decided by this court. States have undertaken in the interests of the public health to exclude importations of a certain kind from other States, and their legislation has been held by this court to be unconstitutional. (*Railroad Co.* v. *Husen*, 95 U. S., 465; *Minnesota* v. *Barber*, 136 U. S., 313; *Brimmer* v. *Rebman*, 138 U. S., 78; *Voight* v. *Wright*, 141 U. S., 62.) These laws were not held

to be void, because they in effect levied taxes upon imports; for it is well settled that the word "imports" in the Constitution refers only to articles brought in from foreign countries. (*License cases*, 5 How., 504, 623; *Woodruff* v. *Parham*, 8 Wall., 123; *Brown* v. *Houston*, 114 U. S., 622, 628; *Coe* v. *Errol*, 116 U. S., 517, 526; *Pittsburg Co.* v. *Louisiana*, 156 U. S., 590, 600.)

The laws were held void because they were regulations of commerce. But the Constitution does not expressly prohibit States from regulating commerce. It merely gives the power of regulation to Congress. Whenever, therefore, this court has held a State law void as being a regulation of commerce, it has impliedly held that a law to the same effect could constitutionally be passed by Congress; that is, so far as Congress is not restrained by some express prohibition.

Indeed, the most familiar exercise of the power to regulate commerce in the minds of the men who framed the Federal Constitution was, doubtless, the total or partial prohibition of traffic in particular articles. This was often accomplished by duties; and those duties, so far as they were laid for prohibition, total or partial, and not for revenue, were regarded as regulations of commerce. Thus Chief Justice Marshall, in his Life of Washington, uses the following language in speaking of the American colonies before the Stamp Act of 1765 (Vol. II, pp. 76–77, 1st ed.):

> In the middle and southern provinces the authority of such of the acts of Parliament of internal revenue as were made for America, as

well as those for the regulation of commerce, even by the imposition of duties, provided those duties were imposed for the purpose of regulation, had been at all times admitted.

And again the Chief Justice says (Vol. II, p. 81, 1st ed.), speaking of the Stamp Act:

> The colonies had long been in the habit of submitting to duties laid on their trade, and had not generally distinguished between those which were imposed for the mere purpose of regulating commerce and this, which, being also designed to raise a revenue, was in truth to every purpose a real tax.

In *Gibbons* v. *Ogden* (9 Wheat., 1, 202), speaking of the constitutional restriction upon the powers of the States in the matter of duties on tonnage, the Chief Justice says:

> It is true that duties may often be, and in fact often are, imposed on tonnage with a view to the regulation of commerce; but they may be also imposed with a view to revenue; and it was therefore a prudent caution to prohibit the States from exercising this power. The idea that the same measure might, according to circumstances, be arranged with different classes of power was no novelty to the framers of our Constitution. Those illustrious statesmen and patriots had been, many of them, deeply engaged in the discussions which preceded the war of our Revolution, and all of them were well read in those discussions. The right to regulate commerce even by the imposition of duties, was not controverted; but the right to impose a duty for

> the purpose of revenue produced a war as important, perhaps, in its consequences to the human race as any the world has ever witnessed.

The remarks of the Chief Justice are fully borne out by history; and the classification of import duties into revenue duties and regulations of commerce lay at the basis of the American doctrine which led to the Revolutionary war. We may refer to the journals of the Continental Congress, vol. 1, pp. 28, 175, 176; vol. 2, p. 189; the examination of Dr. Benjamin Franklin at the bar of the House of Commons on February 7, 1776 (1 Bigelow's Life of Franklin, pp. 478, 479); John Dickinson's "Letters from a Farmer," published in 1768, pp. 15, 18–19, 37–42, 43 (note), 60, 61, 66; Dr. Franklin's letter to Joseph Galloway of February 25, 1775 (8 Spark's Franklin's Works, p. 146); John Adams's letter to Jay of July 19, 1785 (Works of John Adams, vol. 8, pp. 282, 283). The same view was maintained by the leading jurists and statesmen of the first two generations after the adoption of the Constitution; and with practical unanimity they based the protective tariff duties on the commerce clause of the Constitution. (1 Story on the Constitution, sec. 963; 2 id., 1080, et seq.; James Madison's letter to Joseph C. Cabell of March 22, 1827 (Writings of James Madison, vol. 3, p. 571); his letter to Cabell of September 18, 1828 (id., p. 636); Henry Clay's reply to Barbour, March 31, 1824 (Annals of Congress, p. 1994); Gulian C. Verplanck's Letter to Drayton, New York, 1831, pp. 21–23; Speech

of Thomas Smith Grimké, etc., Charleston, 1829, p. 51. Mr. Grimké states that (p. 62):

> In 1790 Edmund Randolph, in his opinion to the President, states among the heads of the power to regulate commerce with foreign nations the power to prohibit their commodities to impose or increase the duties on them.

A recent instance of the imposition of duties under the power to regulate commerce is to be found in the act of August 3, 1882, chapter 376, section 1, which provides "that there shall be levied, collected, and paid a duty of 50 cents for each and every passenger not a citizen of the United States who shall come by steam or sail vessel from a foreign port to any port within the United States." In *Head Money Cases* (112 U. S., 580, 595), Mr. Justice Miller, in delivering the opinion of the court, says that "the power exercised in this instance is not the taxing power. The burden imposed on the ship owner by this statute is the mere incident of the regulation of commerce." (See also Mr. Justice Blatchford's opinion in this case at 18 Fed. Rep., 135, 139, quoted by Mr. Justice Field in *Pollock* v. *Farmers Loan and Trust Co.*, 157 U. S., 429, 594.)

In its application to imports, the power to impose such exactions or duties is a power to exclude. (*Passenger cases*, 7 How., 283, 461, 463; see *McCulloch* v. *Maryland*, 4 Wheat., 316, 431.) There can be no doubt that Congress, under its power to regulate commerce, in so far as not prohibited by the Constitution, may do either. It can not, indeed, levy pecuniary

exactions upon interstate commerce for revenue purposes. It can, however, so long as it does not discriminate against the ports of any of the States, restrict commerce in any article by means of such charges; or it can, as in this instance, prohibit it altogether.

### X. PROHIBITION DISCRETIONARY WITH POLITICAL BRANCH OF THE GOVERNMENT.

*The power to regulate interstate commerce being an express power, with no express restrictions on the prohibition of interstate traffic in a given article, the purposes for which Congress may prohibit are not reviewable by the courts.*

An implied power can be exercised only for the purposes for which it is required, but an express power is unlimited and may be exercised whenever Congress in its discretion shall see fit. Thus in *McCulloch* v. *Maryland* (4 Wheat., 316, 421) Chief Justice Marshall said of the power to incorporate:

> Had it been intended to grant this power as one which should be distinct and independent, to be exercised in any case whatever, it would have found a place among the enumerated powers of the Government.

It may be argued that this prohibition of lottery traffic is in aid of the police power of the States, or even an attempt by Congress to supply deficiencies in the exercise of police power by certain States; and that Congress is not vested with such police power. Were this so, nevertheless Congress, having an express and unlimited power to regulate interstate commerce,

may do so without having its reasons questioned. (See *Doyle* v. *Continental Ins. Co.*, 94 U. S., 535, 541.) It is well settled that Congress has no power to regulate an agricultural or manufacturing industry within a State (*United States* v. *E. C. Knight Co.*, 156 U. S., 1, and cases cited); yet, as above shown, it has always claimed and exercised a right to use its commercial power for the purpose of directing the course of development of these industries. Congress has no power to regulate the descent of real property in the various States; yet it has always had, and frequently exercised, the power to make treaties for the purpose of altering these laws of descent on behalf of the subjects of favored European nations. (*Hauenstein* v. *Lynham*, 100 U. S., 483, and cases cited; *Geofroy* v. *Riggs*, 133 U. S., 258, 266–267.) The exclusion of obscene articles from foreign commerce and of spirituous liquors from commerce with the Indian tribes is for purposes precisely similar to those which inspire our anti-lottery legislation.

XI. SUCH REGULATION NO ABRIDGMENT OF FREEDOM OF PRESS.

It may be suggested, however, by appellants that the act is unconstitutional for the further reason that it abridges the freedom of the press. I can not believe that this suggestion needs extended argument. The liberty of the press is the freedom to express and circulate printed *opinions*. It can not include lottery matter for two reasons. In the first place, such freedom does not include the right to circulate that which,

in the legislative discretion of a country, is immoral or indecent. It could not be contended that obscene literature has freedom of circulation because it is printed. If so, every statute punishing the printing, sale, or circulation of indecent literature is invalid. Congress has seen fit to place lottery matter upon the same ground as indecent literature or other fraudulent or immoral devices, and the freedom of the press is obviously subject to this fundamental limitation imposed by good morals. Moreover, the freedom of the press is the freedom to express printed opinions, and, while lottery advertisements might be within this definition, yet a lottery ticket is not an expression of an opinion in any sense of the word. It is purely a commercial instrument, and its prohibition in no way infringes upon the right to express opinion and circulate the same. All this seems so obvious that no further argument need be made. See *Ex parte Jackson* (96 U. S., 727, 736), *In re Rapier* (143 U. S., 110), and *Horner* v. *United States* (143 U. S., 207), where such police power is clearly upheld. In the Rapier case, Chief Justice Fuller said:

> The States before the Union was formed could establish post-offices and post-roads, and in doing so could bring into play the police power in the protection of their citizens from the use of the means so provided for purposes supposed to exert a demoralizing influence upon the people. When the power to establish post-offices and post-roads was surrendered to the Congress it was as a complete power, and the

grant carried with it the right to exercise all the powers which made that power effective. It is not necessary that Congress should have the power to deal with crime or immorality within the States in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality.

Respectfully submitted.

JAMES M. BECK,
*Assistant Attorney-General.*

# APPENDIX.

## A.

### OPINION OF THE COURT IN REILLEY v. UNITED STATES.

CHARLES W. REILLEY AND OTHERS, plaintiffs in error,
*v.*
THE UNITED STATES OF AMERICA, defendants in error.
} No. 849.

United States Circuit Court of Appeals for the Sixth Circuit.

Error to the District Court of the United States for the Southern District of Ohio.

Submitted January 17, 1901. Decided February 12, 1901.

[The case was argued before Lurton, Day, and Severens, circuit judges, and the opinion was delivered by Severens, C. J. After reciting the acts of Congress involved, and stating at length the form of the indictment and the facts proved in the case, the learned judge delivered the following opinion with reference to the legal questions involved:]

The first question to be resolved arises upon the contention made by counsel for plaintiffs in error, that upon the due construction of the first section of the act of March 2, 1895, the successive clauses enumerating the several cases in which the offense may be

committed, all depend upon a condition which is supposed to exist in consequence of the words first occurring, that the paper, certificate, etc., has been brought into the United States from abroad for the purpose of disposing of the same. It is argued that this must be so for the reason, and this is the principal ground of the argument, that by the second section of the act there is an express provision that no former statute against the establishment of lotteries, traffic in lottery tickets, the circulation thereof or of advertisements relating thereto, should be deemed to be repealed by implication. Without going through with a reference to, and an analysis of, all such former statutes, it is sufficient to say that none such has been brought to our attention which is inconsistent with the statute in question, unless it be the act of September, 1890, which relates to the carriage of matter concerning lotteries in the mails, and which imposes a different penalty in such cases from that imposed by the act in question. From the fact of such discrepancy, it is contended that Congress must have intended that the language of the later act should be construed to refer only to things brought in from abroad to be disposed of in this country against which there had been no previous legislation imposing any other penalty than a forfeiture. There is some force in this argument, but we do not think it sufficient to overcome the clear indications to the contrary. In the first place, it would render the composition of the first section of the act of 1895 ungrammatical. In the next place, the title to the act indicates an intention to exert the power of Congress in all directions authorized by the clauses of the Constitution relating to the regulation of commerce and the establishment of a mail service.

Besides, the distribution of subjects by the language used in the latter part of the section reflects upon the former part a similar meaning. And the whole section is in apt language to cover the ground indicated by the title of the act. And we see no necessity for extending the condition that the matter is brought in "for the purpose of disposing of the same" to other cases than that of bringing it into the United States from abroad. We have no doubt that the purpose of Congress was to lay its hand upon the business at each and every one of the enumerated steps taken for the purpose of carrying it on, and that one of the steps it had in contemplation was the carrying of the instruments employed in the business from one State to another, and that as to this offense no qualification that the act should be done with the purpose of disposing of the thing carried was intended. We may at this point observe that inasmuch as the section of the act under consideration constitutes three distinct offenses, we do not conceive it to be necessary to determine to what extent the act is inconsistent, in respect to the forbidden use of the mails, with former statutes, or if there be such inconsistency, what the effect thereof may be, for the case before us does not involve that offense.

But the question upon which we have the gravest concern, and which is of much importance, arises upon the objection that the act of March 2, 1895, in so far as it relates to the mere carrying of the obnoxious matter from one State into another, though done with knowledge of its character, transcends the constitutional power of Congress. The statute was enacted in the exercise of the power to regulate commerce with other countries and between the States and the power to establish post-offices and post-roads. That part of the statute on

which the present indictment is founded depends upon the authority which may be exercised under the grant of Congress of the first of these powers, and the question is whether the business in which these parties were engaged is "commerce" within the meaning of that term in the Constitution. The question opens a field upon which some lines have been clearly marked, but with respect to the particular inquiry with which we have to deal, we have no distinct guide. Commerce is said by Chief Justice Marshall in the leading case of *Gibbons* v. *Ogden* (9 Wheat., 1) to undoubtedly mean "traffic," but to mean more than that and to signify "intercourse." But both of these latter are general words and do not precisely define what kind of intercommunication is meant; and we have to follow the course of subsequent adjudication in further elucidation of the scope and meaning of the word. Without going into other lines of inquiry than those which are most nearly relevant to the present subject, we come to the case of *Paul* v. *Virginia* (8 Wall., 168), where the question was whether an agent of a New York insurance company, who was engaged in effecting insurance for his company in Virginia with residents of the latter State, was subject to certain regulations of that State of the conditions and manner under and in which such business should be done. And it was held, first, that it was competent for the State to prescribe the conditions upon which the foreign corporation should be admitted to do business in the State, and, second, that the business of insurance, conducted as that was, was not interstate commerce. It is to be observed, however, that, as pointed out by Mr. Justice Field, the business there in question did not involve intercourse between one party in one State and another party in another State, for the transactions took

place wholly in Virginia, and the communications between New York and Virginia were wholly between the constituents of one party—that is to say, the insurance company and its agent—and the dealing was not between those persons. Said Mr. Justice Field:

> The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce

That case would seem to have sometimes received a wider interpretation than the decision upon the facts would justify, and to have been supposed to justify the proposition that a contract of insurance effected through interstate communication is not interstate commerce, but no authoritative decision affirming that proposition has been cited, or has been found by us. In the *Trade-mark cases* (100 U. S., 82) Mr. Justice Miller, in the course of reasoning from analogies, at page 95, said that "in *Paul* v. *Virginia* (8 Wall., 168) this court held that a policy of insurance made by a corporation of one State on property situated in another was not an article of commerce, and did not come within the clause we are considering." "They are not," says the court, "commodities to be shipped or forwarded from one State to another and then put up for sale." "On the other hand," pursues the learned justice, "in *Almy* v. *State of California* (24 How., 169) it was held that a stamp duty imposed by the legislature of California on bills of lading for gold and silver transported from any place in that State to

another out of the State was forbidden by the Constitution of the United States, because such instruments being a necessity to the transaction of commerce, the duty was a tax upon exports."

With great deference to the learned justice we can not think that his statement of what was held in *Paul* v. *Virginia* was correct. And, moreover, the ground on which he says that that decision was placed, namely, that policies of insurance are not commodities to be shipped from one State into another, and there put up for sale, could not be supported as sufficient in view of what has been decided in other cases presently to be referred to, and would, as it seems to us, be much narrower than the bounds of the definition given in *Gibbons* v. *Ogden*.

The case of *Paul* v. *Virginia* was again cited in *Philadelphia Fire Association* v. *New York* (119 U. S., 110), but only in that case in support of the proposition that a State has power to prescribe the conditions on which a foreign corporation may be admitted to do business in the State. The question there was whether a foreign corporation which had entered the State and carried on business therein could question the validity of a law of the State prescribing such conditions. *Paul* v. *Virginia* was again referred to in *Hooper* v. *California* (155 U. S., 648), at page 653, which was a case involving the validity of a statute of California making it a misdemeanor for a person in that State to procure insurance for a resident thereof from a foreign corporation which had not filed the bond required by another statute of that State. The court held that the law was a valid exercise of the right of the State to prescribe conditions upon which the foreign corporation should be allowed to do business

therein, unless such business of the foreign company was one of a "Federal nature," one class of which is interstate commerce. To the contention that marine insurance (which was the business that the respondent was charged with having conducted without filing the bond required) was interstate commerce, and so beyond the reach of State authority, it was replied that "this proposition involves an erroneous conception of what constitutes interstate commerce. That the business of insurance does not generically appertain to such commerce has been settled since the case of *Paul* v. *Virginia*" (8 Wall., 168; see also *Philadelphia Fire Insurance Association* v. *New York* (119 U. S., 110), and authorities there cited).

It is not within our province to question the law as declared by the court in that case, nor have we any disposition to do so, but for the purpose of comparing the classes of cases which we deem most relevant to our present duty, we are, no doubt, permitted to say that what we understand the language of the opinion last cited to mean is that the effecting insurance is not necessarily interstate business, and would not be so where the contract was made in the State and the participants in the transaction were in the State. The case does not decide that if by the method of doing the business the party desiring insurance in one State should transmit his application therefor to an insurer in another State, and the insurer should thereupon transmit to the insured his acceptance of the application, this would not constitute interstate commerce. But if this were so established, we do not think the doctrine would be applicable here for reasons hereinafter stated. This class of cases is principally relied upon by counsel for plaintiffs in error as declaring the rule that in order to constitute commerce there must be traffic in commodities, and that

interstate commerce involves also the transportation of such commodities from one State to another, and that mere business intercourse between parties residing in different States unaccompanied by the transportation of commodities such as are bought and sold by traffic is not within the scope of commerce between the States within the meaning of the Constitution. But we do not think that upon a comparison with other decisions of the Supreme Court so broad a doctrine was intended to be affirmed in the cases to which we have referred.

Passing to other classes of cases arising upon the exercise of the power in question, it has been frequently held, as was said by Mr. Justice Bradley in *Crutcher* v. *Kentucky* (141 U. S., 47), that the power of Congress over interstate commerce is coextensive with its power over foreign commerce. Indeed, both are included in an identical grant. Can it be possible to hold that Congress has not the power to prohibit the importation from abroad into the United States of instrumentalities for carrying on a business fraught with evil to its inhabitants? Or, to put a precisely relevant question, can it be doubted that Congress has the authority to legislate against the importation of lottery tickets into the United States from foreign countries, as it has attempted to do by this act? It would seem that the denial of such power would be an unfortunate and uncalled-for restriction of the grant of authority intended by the Constitution. Until recently Congress had not seen fit to exercise its power in this direction, and for this reason the instance seems novel, but in the circumstances, this is no argument against its existence.

In respect to the inquiry as to what constitutes interstate commerce, and particularly to the question whether it is limited to the case of traffic in and the

transportation of commodities for the purposes of such traffic, reference may be profitably had to some other cases decided by the Supreme Court. We have already indicated our view that in *Gibbons* v. *Ogden* the subjects which were included in the power granted Congress was not thought to be so restricted. In the case of *Gloucester Ferry Co.* v. *Pennsylvania* it was held that the transportation of passengers as well as freight from one State to another by a ferry was interstate commerce. In the case of *Covington, etc., Bridge Co.* v. *Kentucky* it was held that the company's bridge across the Ohio was an instrumentality of interstate commerce, because it furnished the means of intercourse between the people of two States, and the taking of toll for the passage of persons, as well as of freight, was interstate business. In that case it was remarked by Mr. Justice Brown in delivering the opinion of the court, referring to the Gloucester Ferry case, "If, as was intimated in that case, interstate commerce means simply commerce between the States, it must apply to all commerce which crosses the State line regardless of the distance from which it comes or to which it is bound; in other words, if it be commerce to send goods from Cincinnati, in Ohio, to Lexington, in Kentucky, it is equally such to send goods or travel in person from Cincinnati to Covington." And again, "commerce was defined in *Gibbons* v. *Ogden* (9 Wheat., 1–189) to be 'intercourse,' and the thousands of people who daily pass and repass over the bridge may as truly be said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool." In that case the "bridge" was a mere instrumentality. It was the use of it for the purpose of intercourse between the people of the two

States which impressed upon the structure the character of an instrumentality or agency of such intercourse. Indeed, it is impossible to conceive that an instrument by which business is transacted can have any commercial character otherwise than as is reflected upon it by the business itself. Whether it be a ferry, a bridge, a railroad, or a telegraph line, the agency has no intrinsic quality which brings it within the purview of the commerce clause of the Constitution. It acquires that quality from its appropriation to the uses of interstate commerce. In *Telegraph Co.* v. *Texas* (105 U. S., 460) it was decided that intercourse by the telegraph between the States is interstate commerce, and that a tax on messages is a tax on the commerce itself. And this doctrine has been reaffirmed in several subsequent cases. So it was held in the *Passenger cases* (7 How., 283) and *Henderson* v. *The Mayor* (92 U. S., 259) that the importation of passengers into the United States was commerce with foreign nations, and so within the control of Congress. And so it is not doubted that Congress may legislate for the exclusion of passengers who from diseased or other conditions would be an offense to the welfare of the public. And in *Crandall* v. *Nevada* (6 Wall., 35), the doctrine of the cases last cited was applied to the transportation of passengers by a railroad from one State into another. These cases seem to us altogether inconsistent with the idea that interstate commerce is limited to traffic in commodities or merchandise. In the telegraph cases, for instance, it is nowhere suggested that the messages which would be exempt from State taxation should be such only as relate to traffic. In the passenger cases there is no element of barter of commodities or merchandise of any sort.

In the present case it would seem that the enterprise in which these parties are alleged to have been engaged

was one which involved business intercourse between parties in different States, and that by means of the transportation of the instruments with which it was carried on from one State into another. And it is not material that transportation was done by a private individual rather than by a corporation. The slips which represented the interest of the buyer of the chance, its contents being understood by all the parties to the transaction, was a ticket in the lottery. That the game was a lottery has several times been decided in the State courts. *People* v. *Elliot*, 74 Mich., 264; *Commonwealth* v. *Sullivan*, 146 Mass., 142; *Wilkinson* v. *Gill*, 74 N. Y., 63; *State* v. *Kansas Mercantile Association*, 45 Kans., 351.

The inclination of our judgment is to hold that the statute in question is not invalid, and that the present case is covered by it. But conceding that there may be some doubt of the correctness of our conclusion that the statute is within the power of Congress, the doubt we have is not sufficient to justify us in holding it to be invalid, seeing that in this class of cases our judgment is made by law subject to the supervision of the Supreme Court.

It is further objected that the indictment is defective in not showing that a lottery was being conducted. No objection was made on this account either before or at the trial. We think it appears with reasonable certainty that such a transaction was being carried on, although the averments are not, perhaps, so direct and specific as would have been necessary to encounter a prompt objection on that account.

The indictment is much more full and specific than that in *Com.* v. *Sullivan* (*supra*), which the court said was "well enough."

It is also urged that the evidence did not justify the verdict in that there was no proof of conspiracy to do

what was done. As has been often remarked, it is not necessary that direct evidence of a formal agreement should be given in such cases. If the evidence of the separate details of the transaction as it was carried out indicates with the requisite certainty the existence of a preconcerted plan and purpose, that is sufficient. And we think the evidence was such as to warrant the verdict.

Many objections were made upon the trial to the rulings of the court in admitting evidence. More than one hundred and fifty errors are assigned, a large proportion of which relate to these rulings. Many of the objections related to similar matters, and there was needless and tiresome repetition.

We have, however, gone through the bill of exceptions and have found no instance in which any ground or reason whatever was assigned on which the objections were made. The reason for the rule requiring counsel to state the grounds of their objections is augmented where the frequency of objections may lead the court to the conclusion that the counsel is content to take his chances in finding the reasons afterwards. The rule itself is settled by a great number of decided cases, many of which are collected in 8 Encyl. of Pl. & Pract., at page 163; and see especially as indicating the practice in the courts of the United States, *Camden* v. *Doremus*, 3 How., 315; *Tabor* v. *Commercial National Bank of Cleveland*, 62 Fed., 383.

General exceptions were taken to the charge of the court to the jury. Some of them have been disposed of by what we have said in dealing with the topics already discussed. We have examined the instructions of the court, as well as the requests of counsel for the respondents to charge the jury, and think the case was

fairly submitted to the jury, and that all proper instructions were given them. In view of the multitudinous exceptions and assignments of error under this head, we must content ourselves with refraining from a separate discussion of each.

The judgment will be affirmed.

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B.

MR. JEFFERSON'S VIEWS ON LOTTERIES.

[After some discussion of the element of chance in life Mr. Jefferson says:]

There are some other games of chance useful on certain occasions and injurious only when carried beyond their useful bounds. Such are insurances, lotteries, raffles, etc. These they do not suppress, but take their regulation under their own discretion. The insurance of ships on voyages is a vocation of chance, yet useful, and the right to exercise it, therefore, is left free. So of houses against fire, doubtful debts, the continuance of a particular life, and similar cases. Money is wanting for a useful undertaking as a school, etc., for which a direct tax would be disapproved. It is raised therefore by a lottery, wherein the tax is laid on the willing only, that is to say, on those who can risk the price of a ticket without sensible injury for the possibility of a higher prize. An article of property, insusceptible of division at all, or not without great diminution of its worth, is sometimes of so large value as that no purchaser can be found while the owner owes debts, has no other means of payment, and his creditors no other chance of obtaining it but by its sale at a full and fair price. The lottery is here a salutary instrument for disposing of it, where many run small risks for the chance of obtaining a high prize.

In this way the great estate of the late Colonel Byrd (in 1756) was made competent to pay his debts, which, had the whole been brought into the market at once, would have overdone the demand, would have sold at half or quarter the value, and sacrificed the creditors, half or three-fourths of whom would have lost their debts. This method of selling was formerly very much resorted to until it was thought to nourish too much a spirit of hazard. The legislature were therefore induced not to suppress it altogether, but to take it under their own special regulation. This they did for the first time by their act of 1769, c. 17, before which time every person exercised the right freely, and since which time it is made unlawful but when approved and authorized by a special act of the legislature.

Since then this right of sale by way of lottery has been exercised only under the jurisdiction of the legislature. Let us examine the purposes for which they have allowed it in practice, not looking beyond the date of our independence.

1. It was for a long time an item of the standing revenue of the State.

1813, c. 1, sec. 3. An act imposing taxes for the support of Government; and c. 2, sec. 10.

1814, Dec., c. 1, sec. 3. 1814, Feb., c. 1, sec. 3. 1818, c. 1, sec. 1. 1819, c. 1. 1820, c. 1.

This, then, is a declaration by the nation, that an act was not immoral, of which they were in the habitual use themselves as a part of the regular means of supporting the Government; the tax on the vendor of tickets was their share of the profits, and if their share was innocent, his could not be criminal.

2. It has been abundantly permitted to raise money by lottery for the purposes of schools; and in this, as in many other cases, the lottery has been permitted to

retain a part of the money (generally from ten to fifteen per cent) for the use to which the lottery has been applied. So that while the adventurers paid one hundred dollars for tickets, they received back eighty-five or ninety dollars only in the form of prizes, the remaining ten or fifteen being the tax levied on them, with their own consent. Examples are:

1784. c. 34. Authorizing the city of Williamsburg to raise 2,000 pounds for a grammar school.

1789. c. 68. For Randolph Academy, 1,000 pounds.

1789. c. 73. For Fauquier Academy, 500 pounds.

c. 74. For the Fredericksburg Academy, 4,000 pounds.

1790. c. 46. For the Transylvanian Seminary, 500 pounds.

For the Southampton Academy, 300 pounds.

1796. c. 82. For the New London Academy.

1803. c. 49. For the Fredericksburg Charity School.

c. 50. For finishing the Strasburg Seminary.

c. 58. For William and Mary College.

c. 62. For the Bannister Academy.

c. 79. For the Belfield Academy.

c. 82. For the Petersburg Academy.

1804. c. 40. For the Hotsprings Seminary.

c. 76. For the Stevensburg Academy.

c. 100. For William and Mary College.

1805. c. 24. For the Rumford Academy.

1812. c. 10. For the Literary Fund. To sell the privilege for $30,000 annually, for seven years.

1816. c. 80. For Norfolk Academy, $12,000.
Norfolk Female Society, $2,000.
Lancastrian School, $6,000.

3. The next object of lotteries has been rivers:

1790. c. 46. For a bridge between Gosport and Portsmouth, 400 pounds.
1796. c. 83. For clearing Roanoke River.
1804. c. 62. For clearing Quantico Creek.
1805. c. 42. For a toll bridge over Cheat River.
1816. c. 49. For the Dismal Swamp, $50,000.

4. For roads:

1790. c. 46. For a road to Warminster, 200 pounds. For cutting a road from Rockfish gap to Scott's and Nicholas's landing, 400 pounds.
1796. c. 85. To repair certain roads.
1803. c. 60. For improving roads to Snigger's and Ashby's gaps.
c. 61. For opening a road to Brock's gap.
c. 65. For opening a road from the town of Monroe to Sweet Springs and Lewisburg.
c. 71. For improving the road to Brock's Gap.
1805. c. 5. For improving the road to Clarksburg.
c. 26. For opening a road from Monongalia Glades to Fishing Creek.
1813. c. 44. For opening a road from Thornton's Gap.

5. Lotteries for the benefit of counties:

1796. c. 78. To authorize a lottery in the county of Shenandoah.
c. 84. To authorize a lottery in the county of Gloucester.

6. Lotteries for the benefit of towns:

1782. c. 31. Richmond, for a bridge over Shockoe; amount not limited.

1789. c. 75. Alexandria, to pave its streets, 1,500 pounds.

1790. c. 46. Alexandria, to pave its streets, 5,000 pounds.

1796. c. 79. Norfolk, one or more lotteries authorized.

c. 81. Petersburg, a lottery authorized.

1803. c. 12. Woodstock, a lottery authorized.

c. 48. Fredericksburg, for improving its main street.

c. 73. Harrisonburg, for improving its streets.

7. Lotteries for religious congregations:

1785. c. 111. Completing a church in Winchester.

For rebuilding a church in the parish of Elizabeth River.

1791. c. 69. For the benefit of the Episcopal Society.

1790. c 46. For building a church in Warminster, 200 pounds.

in Halifax, 200 pounds.

in Alexandria, 500 pounds.

in Petersburg, 750 pounds.

in Shepherdstown, 250 pounds.

8. Lotteries for private societies:

1790. c. 46. For the Amicable Society in Richmond, 1,000 pounds.

1791. c. 70. For building a Free Masons' hall in Charlotte, 750 pounds.

9. Lotteries for the benefit of private individuals (to raise money for them):

1796. c. 80. For the sufferers by fire in the town of Lexington.

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1781. c. 6. For completing titles under Byrd's lottery.

1790. c. 46. To erect a paper mill in Staunton, 300 pounds.

To raise 2,000 pounds for Nathaniel Twining.

1791. c. 73. To raise 4,000 pounds for William Tatham, to enable him to complete his geographical work.

To enable ——— to complete a literary work.

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No. 106 &

Sup. Ct. Bf. of Atty. Gen. for Appellee

Filed Feb. 27, 1901.

Office Supreme Court U.S.
FILED
FEB 27 1901
JAMES H. McKENNEY,
Clerk.

# In the Supreme Court of the United States.

OCTOBER TERM, 1900.

CHARLES F. CHAMPION, APPELLANT,
*v.*
JOHN C. AMES, UNITED STATES MARSHAL. } No. 106.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

## SUPPLEMENTAL BRIEF OF APPELLEE.

JAMES M. BECK,
*Assistant Attorney-General.*

# In the Supreme Court of the United States.

OCTOBER TERM, 1900.

CHARLES F. CHAMPION, APPELLANT,
*v.*
JOHN C. AMES, UNITED STATES MARSHAL. } No. 106.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

## SUPPLEMENTAL BRIEF FOR APPELLEE.

Counsel for appellant place so much reliance upon the doctrine of the insurance cases that I venture to submit for the convenience of the court the exact facts in each of those cases upon which the decision was predicated

These cases, in the order of their decision, are as follows:

*Paul* v. *Virginia*, 8 Wall., 168 (1868).

The legislature of Virginia passed an act which provided that no insurance company not incorporated under the laws of the State should carry on its business within the State without previously obtaining a license for that purpose. By a subsequent act it was provided that no person should, without a license authorized by

law, act as agent for any foreign insurance company, and that every person offering to issue or make any contract or policy of insurance for any company created or incorporated elsewhere than in the State should be regarded as an agent of a foreign insurance company. In May, 1866, Paul, a resident of Virginia, was appointed agent in Virginia of several insurance companies incorporated in the State of New York to carry on a general business of insurance against fire. He applied to the proper officer for a license to act as such agent within the State, but refused to deposit certain bonds which, by the State statute of Virginia, were requisite to the issuance of a license. The license was refused. Notwithstanding this refusal, he undertook to act as agent for the New York companies, and as such issued a policy in Virginia in their name to a citizen of Virginia. For this he was indicted and convicted, and from this conviction an appeal was taken to this court. This court, in an opinion by Mr. Justice Field, after holding that a corporation was not a citizen within the meaning of Article IV, section 2, of the Constitution, sustained the constitutionality of the act upon the following grounds (p. 183):

> The defect of the argument lies in the character of their business. Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word.

> They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. *Such contracts are not interstate transactions, though the parties may be domiciled in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce.*

*Ducat* v. *Chicago*, 10 Wall., 410 (1870).

The State of Illinois passed a statute requiring the agents of insurance companies desirous to transact business in the State to take out a license from the auditor of State. Such licenses were from year to year. By a later statute the legislature provided that all foreign insurance companies placing insurance in the city of Chicago should pay to the city treasurer 2 per cent upon all premiums. Ducat was the agent in Chicago of several New York insurance companies and took out his license. He paid the license fee, but refused to pay the 2 per cent to the city of Chicago. The case was argued during the pendency of the case

of *Paul* v. *Virginia*, upon the authority of which the constitutionality of the statutes was sustained.

*Liverpool Insurance Company* v. *Massachusetts*, 10 Wall, 566 (1870).

This was a tax of the State of Massachusetts upon insurance companies, "incorporated or associated," of 4 per cent upon all premiums charged or received on contracts made in the Commonwealth. Payment was resisted, in part upon the ground that this was not a corporation, and that the tax, in any event, was a regulation of interstate commerce. This court adhered to the decision in *Paul* v. *Virginia*, saying, in an opinion by Mr. Justice Miller (p. 573):

> The case of *Paul* v. *Virginia* decided that the business of insurance, *as ordinarily conducted*, was not commerce, *and that a corporation of one State, having an agency by which it conducted that business in another State, was not engaged in commerce between the States.*

*Philadelphia Fire Association* v. *New York*, 119 U.S., 110 (1886).

The defendant was a Pennsylvania corporation engaged in fire insurance. In 1872 it established an agency in the State of New York and complied with the necessary statutory requirements to do business in that State, except as hereinafter mentioned. Subsequent to such admission, the State of New York by legislation imposed a yearly tax of 3 per cent on the premiums received by the Philadelphia association in the State of New York in a certain year, and payment was resisted on the ground that this was unconstitu-

tional under the fourteenth amendment. This court sustained the constitutionality of the tax upon the following grounds (p. 119):

> This Pennsylvania corporation came into the State of New York to do business by the consent of the State, under this act of 1853, with a license granted for a year, and has received such license annually, to run for a year. It is within the State for any given year under such license, and subject to the conditions prescribed by statute. The State, having the power to exclude entirely, has the power to change the conditions of admission at any time, for the future, and to impose as a condition the payment of a new tax, or a further tax, as a license fee.

*Hooper* v. *California*, 155 U. S., 648 (1894).

In this case the State of California provided by act that "the insurance commissioner must require every company not incorporated under the laws of this State, and proposing to transact insurance business by agent or agents in this State, before commencing such business to file in his office a bond," etc., and it is further provided that if any person "*who in this State procures, or agrees to procure, any insurance for a resident of this State, from any insurance company not incorporated under the laws of this State, unless such company or its agent has filed the bond required by the laws of this State relative to insurance, is guilty of a misdemeanor.*" Plaintiff in error was arrested under this criminal statute and was charged with having procured insurance on account

of foreign companies that had not complied with the law requiring the entry of the bond, and was found guilty. It appeared from the agreed facts that the firm of Johnson & Higgins were insurance brokers having their principal place of business in New York; that they had a place of business in the city of San Francisco, State of California, and that the defendant had charge of such business as an agent; that one Mott, a resident of the State of California, applied to Hooper as such agent for certain marine insurance, and thereupon Hooper informed Johnson & Higgins of Mott's inquiry, in reply to which Johnson & Higgins telegraphed Hooper, in effect, that the insurance had been procured. Hooper then communicated the telegram to Mott, and later Johnson & Higgins forwarded a policy in the China Mutual Insurance Company, a foreign corporation which had not filed the bond required by the laws of California, to Hooper, and Hooper then delivered the policy to Mott in San Francisco. Mott paid for the same there, of which payment Hooper advised Johnson & Higgins. This court sustained the constitutionality of the act in an opinion by Mr. Justice White, who, *inter alia*, said (p. 652):

> The contention here is that, inasmuch as the contract was one for *marine* insurance, it was a matter of interstate commerce, and as such beyond the reach of State authority and included among the exceptions to the general rule. This proposition involves an erroneous conception of what constitutes *interstate* commerce. That the business of insurance does not *generically* apper-

> tain to *such* commerce has been settled since the case of *Paul* v. *Virginia*, 8 Wall., 168. See also *Phila. Fire Insurance Co.* v. *New York*, 119 U. S., 110, and authorities there cited.

That this decision was based, as the preceding decisions, upon the theory that the contract between the assured and the insurer was made within the limits of a particular State, is clearly indicated by the learned justice as follows (p. 656):

> It is urged that the words "every person who agrees to procure for a resident of this State," are inconsistent with the preceding language, "who in this State procures," etc. The argument is this: The act punished is procuring for a resident; in order to procure for another the procurer must be the agent of such other; hence the contract of insurance was procured by the agent of the insured, and not by the agent of the foreign company; and inasmuch as the foreign company was not, and under the law could not be, technically, within the State for the purpose of giving its assent to the contract, the insurance must have been procured without the State. The fallacy here is ingenious, but it is easily exposed. The elementary rule is that every reasonable construction must be resorted to in order to save a statute from unconstitutionality. (*Parsons* v. *Bedford*, 3 Pet., 433; *United States* v. *Coombs*, 12 Pet., 72; *Brewer* v. *Blougher*, 14 Pet., 178; *Grenada County* v. *Brogden*, 112 U. S., 261; *Presser* v. *Illinois*, 116 U. S., 252.)
>
> The admission that the insurance was procured for the resident from a foreign company,

which had no agent in the State, does not exclude the possibility of its having been procured within the State. *If it were obtained for the resident by a broker who was himself a resident, this would be a procuring within the State and be covered by the statute.*

The business of a broker is to serve as a connecting link between the party who is to be insured and the party who is to do the insuring—to bring about "the meeting of their minds," which is necessary to the consummation of the contract. In the discharge of his business he is the representative of both parties to a certain extent.

*Allgeyer* v. *Louisiana*, 165 U. S., 578 (1896).

The State of Louisiana provided that any person, firm, or corporation who in any manner whatever does an act in that State to effect for himself or for another insurance on property then in that State in any marine insurance company which has not complied in all respects with the laws of the State, shall be subject to a fine of $1,000 for each offense. Suit was brought against the defendant, Allgeyer & Co., on the ground that they had violated the statute by mailing in New Orleans a letter of advice or certificate of marine insurance to the Atlantic Mutual Insurance Company of New York, advising that company of the shipment of 100 bales of cotton to foreign ports, in accordance with the terms of an open marine policy. Defense was made on the ground that the transactions in question were beyond the jurisdiction of the State of Louisiana; that the contracts of insurance made by the defendants

were made with an insurance company in the State of New York, where the premiums were paid, and where the losses thereunder, if any, were also to be paid, and that the contracts were, therefore, New York contracts. It appeared from the agreed state of facts that the Atlantic Mutual Insurance Company, a New York corporation, had made a contract with Allgeyer & Co. for an open policy of marine insurance for $200,000, by the terms of which it was provided that "shipments applicable to this policy to be reported to this company by mail or telegraph," etc. The Atlantic Mutual Insurance Company had not engaged in the business of marine insurance and had not appointed any agent in the State of Louisiana. Premiums were payable in the city of New York, and were remitted by defendants from New Orleans by exchange. It was admitted "that the contract, i. e., the open policy, was entered into at New York City." This court held that the act was unconstitutional. In discussing the case of *Hooper v. California*, upon which the defendants in error relied, Mr. Justice Peckham says, after stating the facts in the Hooper case (p. 587):

> The court held that the whole transaction amounted to procuring insurance within the State of California by Hooper, residing there and for a resident in the State, from an insurance company not incorporated under its laws and which had not filed the bond required by the laws of the State relative to insurance; that Hooper, the defendant, acted as the agent of his principals in New York City, who were average

> adjusters and brokers there, and who had a place of business in San Francisco, and that Hooper, as such broker, having applied for the insurance to his principals in New York City, received the policy from them for delivery in San Francisco, and the premium was there paid.

In distinguishing the Allgeyer case from the Hopper case Mr. Justice Peckham said (p. 587):

> In the case before us the contract was made beyond the territory of the State of Louisiana, and the only thing that the facts show was done within that State was the mailing of a letter of notification, as mentioned above, which was done after the principal contract had been made.

*New York Life Insurance Company* v. *Cravens*, 178 U. S., 389 (1900). In this case it was agreed that the defendant was a New York corporation engaged in life insurance. As such, it maintained an agent in the State of Missouri, through whom a policy of life insurance was signed and delivered to one Cravens. The application for the insurance was signed by the agent of the company and forwarded to the home office in New York, and thereupon the policy was issued and transmitted to Kansas City by the company to its agent, who there received the same and there delivered it to Cravens and collected the first premium. Subsequent premiums were also paid in Missouri. The policy lapsed through nonpayment of premiums, and the question was the amount which could be recovered upon it under a local statute of the State of Missouri. By the Missouri statute the

contract was to be construed according to the laws of Missouri, and by the terms of the policy the contract was to be construed according to the laws of New York. It was claimed that the Missouri statute was an attempted regulation of interstate commerce. The lower court sustained the statute on the ground that it was competent for Missouri to prescribe this or any condition as a prerequisite for a foreign corporation to do business within the State, and this view was sustained by this court, citing the previous line of cases.

**It is apparent, therefore, that the doctrine of these cases has always been based upon the fact that the method of transacting insurance makes the transaction intra-State, and not inter-State. In the only case in which a State statute was held to be unconstitutional, the contract was made without the State. In every other case the contract was held to have been made by both insurer and insured (the former acting through the local agent), within the particular State.**

It is to be observed that no case has as yet squarely presented an insurance transaction which was not thus effected through a local agency. The nearest approach to it is the Allgeyer case, where a citizen of Louisiana made such a contract in New York upon property which was in Louisiana, and it was held that the State of Louisiana could not restrict his freedom even with reference to property within its legislative power. Whether, if Allgeyer had written directly to the New York company and made his application for insurance, and the New York company had sent him to New Orleans by express a policy of insurance, without the intervention of a local agent, the transaction would

become interstate commerce, has not yet been expressly decided by this court. In such a transaction it is obvious that physical interstate transportation twice takes place. The insured would transport across the State boundary his money for a commercial purpose, and in return there would be a physical transportation of the policy. That this is a commercial transaction in the general sense of the term can hardly be questioned. That it is interstate is likewise obvious. It would seem to be intercourse for commercial purposes between citizens of different States within the meaning of Chief Justice Marshall in *Gibbons* v. *Ogden*.

It is, however, not necessary for the court to pass upon this hypothetical case, which is only given by way of illustration, for the case at bar is clearly distinguishable. An insurance policy is not a commodity. It is not a thing which is customarily bought and sold and recognized as a subject of such exchange. Its physical transportation from State to State, therefore, may not be interstate commerce. A lottery ticket, however, as has been amply shown, was, at the time of the framing of the Constitution, a subject of purchase and sale in every civilized country, and is to-day to an extent far greater than is generally believed. The physical transportation, therefore, of such lottery tickets is that of an exchangeable commodity, and as such it is a commercial article, and its transportation is commercial in character.

I venture to suggest one other thought, and that is the extent to which Congress can determine what is an

article of commerce. It is obvious that this question is not wholly or always a question of law. Unquestionably the general principles governing the question are legal in character and exclusively for this court, but their application to particular things may sometimes raise questions of fact as to the usages of the commercial world. In such case to what extent does the judgment of Congress as to such questions affect the matter? In *Leisy* v. *Hardin* (135 U. S., 100, 125) it was said:

> Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we can not hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by State laws amounting to regulations, while they retain that character; although, at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them.

If the responsibility rests with Congress to determine what things should not be the subject of physical transportation from State to State, why may it not decide incidentally, as matter of fact, what things are thus transported? Congress, in the statute under consideration, has clearly expressed its opinion that the lottery traffic is commercial in character and that its transportation from State to State should be prevented. Does not this act go far to establish the fact of a commercial interstate traffic in lottery tickets? This court has

held that it will not declare any act unconstitutional unless such conclusion is irresistible and beyond any fair doubt, and it has also held that where any statute is under consideration, any construction will be favored which is consistent with its constitutionality. (See *Hooper* v. *State*, 155 U. S., 656). Reading the anti-lottery act from this standpoint, may it not reasonably be regarded at least as persuasive evidence that there is a traffic in lottery tickets, and that, in pursuance of such traffic, such tickets are physically transported from State to State, and that such transportation is a direct injury to interstate commerce? Assuming these facts, the commercial power to restrain can not be questioned.

Respectfully submitted.

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*Assistant Attorney-General.*

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Nos 293. and 9.
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# In the Supreme Court of the United States.

OCTOBER TERM, 1901.

JOHN FRANCIS ET AL., PETITIONERS,
*v.*
THE UNITED STATES. } No. 293.

CHARLES F. CHAMPION, APPELLANT,
*v.*
JOHN C. AMES, UNITED STATES marshal. } No. 9.

ARGUMENT FOR APPELLEE.

JAMES M. BECK,
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# In the Supreme Court of the United States.

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## ARGUMENT FOR APPELLEE.

### STATEMENT OF THE FRANCIS CASE.

The brief filed by Mr. Outcalt for the appellants was not served upon me until October 11, and as it is anticipated that the case will be argued on the 15th instant, there is not sufficient time to print other than a hurried reply. Were the appellants' brief confined to the question of the constitutionality of the act of March 2, 1895, I would not complain of the hardship of preparing in a few hours a reply to a brief which has evidently taken considerable time in its preparation. The appellants, however, ask the court to review the entire voluminous record, and to pass upon many alleged errors, as to which the

decision of the circuit court of appeals would have been final, had not the constitutional question involved in the present proceedings brought the case to this court. The issuance of a certiorari is a matter of grace, and while it is true that the court may review the entire record, it is also true that it may confine its inquiry to such questions as, in its judgment, justified the issuance of the certiorari. There is reason why this court should take the latter course in the present case. The petition for the certiorari only suggested as the grounds for its issuance the refusal of the court below to quash the indictment, and the constitutionality of the act of March 2, 1895. The Government, acting through the Solicitor-General, assented to the issuance of the certiorari for the reason and under the belief that it was only sought to review the constitutionality of the act, and it is to be presumed that this court did not grant the writ to review any alleged errors other than those suggested in the petition for certiorari. The counsel for the appellants at this late day file an elaborate brief which raises numerous questions in addition to those already indicated. They suggest:

(1) That the venue was not sufficiently proved. (Pages 31–32.)

(2) That a conspiracy was not established by sufficient testimony.

(3) That numerous errors were committed by the trial judge in the admission or exclusion of testimony. (Pages 34 to 48.) These comprised the greater part of the one hundred and fifty assignments of error which

were the subject of argument in the circuit court of appeals.

(4) Numerous instructions by the court were likewise the subject of complaint. (Pages 48 to 54, inclusive.)

I do not wish to deny counsel for appellants in the Francis case the right to argue the important constitutional question involved in the present proceeding at the same time that it is argued in the Champion case; but if the court intends to review all of the other errors which are now pressed upon its consideration, numbering over one hundred, I respectfully request that the Francis case either be restored to the docket for reargument, or that ample time be afforded the Government to file a brief in reply. It is impossible at this time to consider these numerous alleged errors, which do not affect the constitutional question involved, but which only have reference to the trial of the Francis case. I submit, however, that this court is under no obligation to review the decision of the circuit court of appeals with reference to these numerous questions. It was the intention of the act constituting the circuit court of appeals to make its decision final in all criminal cases, except those of a capital nature, and this court will only consider on certiorari such questions as are of great and general importance. To answer *all of these numerous* assignments of error above referred to, even were it practicable at this late day, would require a brief of such length that I do not care to submit one unless so directed by the court.

I shall therefore simply discuss in this brief two questions suggested by the record which are of general importance and which may, therefore, fairly be considered on certiorari, and which were fairly suggested by the petition for the certiorari.

1. Does the act of March 2, 1895, apply only to lottery matter which has been imported into this country?

2. Is the act in question constitutional?

## I.

### THE CONSTRUCTION OF THE ACT OF MARCH 2, 1895.

As to this first question the Government is content to rest its case upon the clear and satisfactory reasoning of Circuit Judge Severens, who announced the judgment of the circuit court of appeals. (See page 362, Transcript of Record.)

I need add little to that which Judge Severens has said. If the language be in doubt, the legislative history of the act will, I think, convince the court that Congress intended to suppress domestic lotteries as well as foreign lotteries. The court is familiar with the fact that for some years the Federal Government has sought to break up the lottery traffic. By Revised Statutes, 3894, 3929, and 4041, it excluded lottery matter from any branch of the mail service. This legislation having proved insufficient, the act of September 19, 1890, was passed, which, in more sweeping and, as was thought, in a more effective way, sought to prohibit the use of the mails in connection with lottery enterprises. Recognizing that much of this lottery matter

came from other countries, the act of August 28, 1894, prohibited the importation into this country of any lottery ticket or any advertisement of any lottery. All of these measures proved ineffective to wholly prohibit the lottery traffic. Excluded from the mails, and from all importation, the lottery companies resorted to express companies and other carriers, and transported their tickets in that way. Foreign lotteries, to evade the nonimportation act, constituted agencies in this country, and had the necessary tickets and other matter printed in this country and transported in the manner indicated. Congress therefore deemed it necessary, if the traffic was to be suppressed, to prohibit the carriage, by any method, of lottery matter. This gave rise to the act of March 2, 1895. It is unnatural to assume that Congress intended to limit the act of March 2, 1895, to lottery matter which had been first imported. Had this been the case the act would have been largely ineffective and fallen short of its obvious purpose, for tickets and other matter would have been printed in this country, as Mr. Guthrie has already pointed out in his brief in the Champion case. In my original brief in the Champion case, pages 7 to 11, inclusive, I have given the history of the legislation, and a reference to the debates will show that the entire lottery traffic, foreign or domestic, was evidently in the contemplation of Congress. See Senator Hoar's remarks in the Senate, and Mr. Broderick's in the House, quoted on page 11 of my original brief.

The title of the act clearly indicates the purpose to reach the entire traffic, domestic or foreign, and the reasonable and grammatical construction of the act would indicate the same thought. The matter whose carriage is forbidden is "a ticket, chance, share, or interest in, or dependent upon the event of a lottery." Any lottery, whether foreign or domestic is therefore, within the general language of the act. Had Congress referred only to foreign lotteries it would presumably have qualified the language in some way. Its purpose obviously was (1) to prevent the importation of lottery matter; (2) to prevent the carriage by mail of lottery matter; (3) to prevent the carriage from one State to another in the United States of lottery matter; and the situs of the lottery enterprise was wholly unimportant.

## II.

### IS THE ACT OF MARCH 2, 1895, CONSTITUTIONAL?

As to this question, this case does not differ in principle from the case of *Champion* v. *United States*, No. 106, October term, 1900, with which it is to be argued. It is true that the attempt on the part of the defendants to conduct their lottery business in secrecy caused them to issue tickets as the representative of the interests in their lottery which were informal. In the Champion case *the ticket was drawn with all the* necessary formalities to vest in the holder a definite and ascertained interest in the lottery enterprise; whereas, in the Francis case the ticket which entitled the holder to his interest consisted of nothing more than a number of figures printed on a slip of paper. This slip of

paper, however, to quote the language of the circuit court of appeals in affirming the conviction, "represented the interest of the purchaser of a chance, and although containing figures only, it had a definite meaning, and was understood by all the parties concerned." The law always has regard to the substance rather than to the form, and this is especially true in the enforcement of its criminal statutes, for otherwise they could be easily evaded. It is clear that, in the manner that this lottery was conducted, the slips of paper, although containing nothing more than figures, did entitle the holder thereof to an interest in the lottery, the value of which was dependent upon the actual drawing, and that such ticket, like a bond or an ordinary lottery ticket, was transferable upon delivery.

The interstate character of the transaction is also abundantly established. The principal office of the lottery was located in a building in Cincinnati, Ohio, at which the drawings took place. The management maintained in various other States—among them Newport, Ky.—offices or agencies at which the tickets or chances in the drawings could be purchased. From time to time these tickets were conveyed from the agencies in other States than that of Ohio to the office of the enterprise in Cincinnati, Ohio, and after the drawings were made the result was telegraphed by a cipher code from the main office in Cincinnati to the various agencies in other States, and the ticket, a duplicate of which was retained at the main office, was sent with the prize, if any, to the holder of the original slip in such other State.

The testimony furthermore abundantly established the defendants' connection with this lottery enterprise. Reilley was in charge of the principal office, Francis of the drawings, Hoff had charge of the agency in Newport, Ky., and Edgar conveyed the slips from Newport, Ky., to Cincinnati, Ohio, and the prize, if any, from Cincinnati to Newport.

The defendants were charged with conspiring to commit an offense against the United States in that they conspired to violate the act of March 2, 1895. In effect they are charged with conspiring "to cause to be carried from one State to another in the United States, to wit, from the city of Newport, in the State of Kentucky, to the city of Cincinnati, in the State of Ohio, papers, certificates, and instruments purporting to be and to represent, as they then and there well knew, ticket chances, shares, and interests in and dependent upon the event of a lottery and similar enterprise offering prizes dependent upon lot and chance."

As the tickets in question were the evidence of the holder's right to participate in the drawing of a lottery *thereafter to take place*, the case presents the precise question which this court declined to pass upon in the case of *France* v. *United States* (164 U. S., 676).

In that case, it will be remembered, the matter transported was only the *announcement* of the results of a drawing which had *previously* taken place, and was, therefore, held to be without the strict letter of the statute.

In presenting the argument in behalf of the Government in the case at bar, it is not my purpose to

restate the argument on the constitutional question already filed in the Champion case. My brief already filed in that case was a careful attempt on my part to submit to the court whatever considerations pertinent to the issue which suggested themselves to me as of value to the court. I therefore submit the present case upon the brief already filed in the Champion case, and while I shall venture to amplify one or more of the suggestions contained in the Champion brief, yet whatever is herein stated should be regarded as supplemental only to that which has already been submitted to the court. Indeed, I hesitate to add anything to the two briefs already submitted, and only do so in view of some suggestions which were made on the oral argument, and also in view of some decisions of this court, which have been rendered since the Champion case was argued.

In my original brief (pp. 39, 44) I argued that even if the lottery ticket could not be regarded in itself as an article of commerce, yet the interest which it represented, and to which it was the legal title, could be regarded as an article of commerce, and as such within the Federal commercial power, when its purchase or sale is interstate in character. I argued that no practical or safe distinction could be made between the thing bought and sold and the evidence of title with which the thing is ordinarily sold. I cited the case of *Athy* v. *California* (24 How., 169), as explained by the subsequent case of *Woodruff* v. *Parham* (8 Wall., 123, 137), by which it was decided that if a tax on merchandise

exported was void as a regulation of interstate commerce, that a tax on the bill of lading, which ordinarily accompanies it, was equally an unconstitutional regulation of commerce when attempted by a State. The court has since affirmed this view by the recent case of *Fairbanks* v. *United States* (181 U. S., 283). In the case the constitutionality of the war-revenue act imposing a stamp tax on a foreign bill of lading was under discussion. This court held that it was unconstitutional, as it offended the provision of article 1, section 9, of the Constitution, that "No tax or duty shall be laid on articles exported from any State."

It was argued in that case that an insignificant stamp tax upon a bill of lading, not necessarily (though ordinarily) used in connection with the exportation of goods, could not be regarded as a tax on the export itself; but this court negatived the contention.

This court, after again affirming the authority of *Almy* v. *California* and *Woodruff* v. *Parham*, and further citing the case of *Brown* v. *Maryland* (12 Wheat., 419), and the *Income Tax Cases* (157 U. S., 429), *Robbins* v. *Taxing District* (120 U. S., 489), thus stated the effect of these decisions:

> The scope of this argument is that inasmuch as interstate commerce can only be regulated by Congress, and is free from State interference, State legislation, although not directly prohibiting interstate commerce, if in substance and effect directly casting a burden thereon, can not be sustained. Or, in other words, constitutional provisions, whether operating by way of grant

> or limitation, are to be enforced according to their letter and spirit, and can not be evaded by any legislation which, though not in terms trespassing on the letter, yet in substance and effect destroy the grant or limitation.

It follows as a necessary corollary that if Congress has the power to regulate interstate commerce by legislation which directly affects the commodities of commerce, that it has equal power to regulate the ordinary, and at times necessary, means, whereby such commodities are customarily bought and sold between citizens of different States. It is upon this theory that the instrumentalities of interstate commerce are brought within the commercial power of the Union without respect to the question as to whether the telegraph message relates to a commercial transaction or whether a commodity is in process of transportation with a view to sale or purchase. The instrumentalities of interstate commerce are each treated as an entirety, and can be regulated by Congress to such an extent that even the form of a brake can be subject to Congressional control. Similarly, the instruments of writing with which interstate commerce is ordinarily conducted, certainly those which are inseparable incidents to the purchase and sale of commodities, must likewise be within the protective power of the Federal Union. As I have already argued, page 43, nine-tenths of all the business of the country is transacted through drafts, checks, certificates of deposit, bills of exchange, promissory notes, etc., and a State could directly affect, and perhaps destroy, interstate commerce, if its power to interfere with and

destroy the commercial media of such commerce be once conceded.

I argued, therefore, that even though the lottery ticket be not in itself an article of commerce, yet it is an inseparable incident by which interests in the lottery enterprise are bought and sold, and if, therefore, the interest in a lottery can be the subject of interstate commerce, then the ticket is equally such subject.

This leads me to an argument to which I have already made brief reference in the Champion brief, and to which, because of its importance, I desire to make further and fuller reference.

I respectfully submit that if, for example, a citizen of Pennsylvania purchases, by correspondence, from a citizen of New York a hundred shares of Pennsylvania Railroad stock and sends to New York, either in specie or by the usual commercial remittance, the purchase value of the stock and receives from his vendor the certificates representing the said hundred shares, that that constitutes interstate commerce within the meaning of the Constitution. I admit that transportation must take place in every interstate commercial transaction, and for that reason land as such can not be the subject of interstate commerce. But in the illustration cited, two acts of transportation take place, the purchase money is sent from Pennsylvania to New York. If sent by specie, it is a physical conveyance of a tangible, visible commodity; if sent by draft, check, or other form of commercial remittance, it is none the less a trans-

portation of money, and ought to be as much within the commercial power of the Union, when made in the interstate sale of goods, as telegraph messages from State to State, of which Mr. Justice Field said, in *Western Union Telegraph Company* v. *Pendleton* (122 U. S., 347).

> Other commerce deals only with persons or with visible and tangible things. But the telegraph transports nothing visible and tangible; it carries only ideas, wishes, orders, and intelligence.

Nevertheless, the transmitted intelligence of the telegraph was held to be interstate commerce, and a commercial remittance from a vendor in one State to a vendee in another State ought equally to be regarded as interstate commerce.

But the remittance of the purchase money is not the only physical act of transportation. The certificate of stock—the only outward, visible, or tangible representative of a valuable property interest—is physically conveyed from New York to Pennsylvania. It is true that only the certificate, which is merely the title to the interest, is conveyed, but from *Almy* v. *California*, *Woodruff* v. *Parham*, *Fairbank* v. *United States*, already cited, it is obvious that the certificate, without which interests in corporate enterprises could not be bought or sold, is a necessary incident of such purchase and sale, and is to be regarded on the same plane therewith. If the framers of the Constitution intended to vest in Congress the power to regulate the purchase and sale by citizens

of different States of a barrel of pork, why did they not equally contemplate a similar regulation for the purchase and sale by such citizens of interests in great corporate enterprises? In their day certificates of stock were comparatively insignificant in value to ordinary merchandise, but to-day the purchase and sale of stock has assumed such stupendous proportions as to include a considerable part of the entire business of the country, and the Constitution falls far short of its avowed purpose with respect to interstate commerce if it did not include such interstate transactions.

It may be true that the framers of the Constitution did not have in view the specific form of sales of corporate shares in vesting the power to regulate commerce in the Federal Government. But this court has already said that—

> The powers of Congress to regulate commerce with foreign nations and among the several States * * * is not confined to the instrumentalities of commerce * * * in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstance.

The fathers did contemplate, however, that all the commercial intercourse of the States, however it might be affected or changed in the centuries before them, should be the subject of Federal control; and to exclude from such operation property interests in which millions of shares are daily sold, and whose value in

dollars runs into the billions, is to materially limit and narrow the scope and field of the Federal power.

What is there in the commerce clause to forbid the inclusion of interests in corporate property as the subject of interstate commerce? Commerce, as the word is used in the Constitution, has received the broadest definition. It includes not only traffic, but every species of commercial intercourse among the States. (Marshall, C.J., in *Gibbons* v. *Ogden*, 9 Wheat., 190–194.)

"Commerce is a term of the largest import," and "comprehends intercourse for the purposes of trade in any and all its forms." *Welton* v. *State of Missouri*, 91 U. S., 280.

Commerce necessarily implies two things, the exchange of one commodity for another, and the transportation either of the purchase money or of the thing bought or sold, and to be within the Constitution this must be interstate. But an interest in a corporate enterprise, though invisible and intangible, may be bought and sold, and both the certificate which evidences this form of property, as well as the purchase money, are the subject of transportation.

It is true that in the line of cases commencing with *Paul* v. *Virginia* (8 Wall., 168), and concluding with *New York Life Insurance Company* v. *Cravens* (178 U. S., 389), it was held that the business of insurance was not interstate commerce. I have already discussed, and I trust distinguished, these cases in my supplemental brief in the Champion case. I have endeavored to show that these decisions were based

not only upon the right of the State to prescribe the terms upon which foreign corporations can do business within their boundaries, but also because the manner of conducting the insurance business is intrastate and not interstate. There is, moreover, a distinction between a policy of insurance and a certificate of stock, a bond or a ticket in a lottery enterprise. A policy of insurance is nothing more than a promise to indemnify a certain person against a possible contingency. It passes no present value; is not transferrable except by permission of the insurer, and is nothing more than an executory contract. A certificate of stock, a bond, or a lottery ticket are the representative of a present interest in property. Indeed, they are property, and can be made the subject of larceny, or a civil suit; as such they are taxable property. They do not constitute a contract between two people, but simply evidence the right of the holder of the ticket or certificate of share to a certain, definite, vested interest in an undivided property. Policies of insurance are not bought and sold as such, but certificates of shares or lottery tickets are the subject of purchase and sale, and can be made transferable upon delivery.

The cases of *Nicoll* v. *Ames* (173 U. S., 509) and *Hopkins* v. *United States* (171 U. S., 578) do not conflict with the view I have suggested. In the earlier case the Kansas City Live Stock Exchange was an unincorporated voluntary association of men, doing business at its stock yards, situated partly in Kansas City, Mo., and partly across the line separating Kansas City, Mo., from Kansas City, Kans. The business of its

members was to receive individually consignments of cattle, hogs, and other live stock from the owners of the same, not only in the States of Missouri and Kansas, but also in other States and Territories, and to feed such stock, and to prepare it for the market, and to dispose of the same, to receive the proceeds thereof from the purchasers, and to pay the owners their proportion of such proceeds, after deducting charges, expenses, and advances. The members were in the habit of soliciting consignments from the owners of such stock, and of making them advances thereon. The question arose whether their business was interstate commerce, and this court held that it was not. The court was of opinion that this stock exchange was but an aid or facility to commerce, and only affected it in an indirect and incidental manner. The decision was clearly based upon the fact that no sale of live stock took place until it had reached the consignee at Kansas City, whereupon it was sold as a part of the business of said stock exchange by one of the members to another member. The transaction was therefore *intrastate*, and the fact that the stock originally came from another State did not alter that fact. Moreover, the precise question was the legality of the combination of members of the exchange with reference to such sales at the exchange, and Mr. Justice Peckham said:

> The selling of an article at its destination which has been sent from another State, while it may be regarded as an interstate sale and one

> which the importer was entitled to make, yet the services of the individual employed at the place where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce, and a combination in regard to the amount to be charged for such service is not, therefore, a combination in restraint of that trade or commerce. Granting that the cattle themselves, because coming from another State, are articles of interstate commerce, yet it does not therefore follow that before their sale all persons performing services in any way connected with them are themselves engaged in that commerce, or that their agreements among each other relative to the compensation to be charged for their services are void as agreements made in restraint of interstate trade.

In *Nicol* v. *Ames* (173 U. S., 509) this court considered the constitutionality of the war-revenue tax upon sales of products or merchandise at exchanges or boards of trade, and also the adhesive-stamp tax upon bonds, debentures, or certificates of stock, etc. In that case the nature of boards of trade was fully inquired into. The court held that the tax was not a tax upon the business itself of purchase and sale, but simply upon the

> facilities made use of and actually employed in the transaction of the business, and separate and apart from the business itself. It is not a tax upon the members of the exchange, nor upon membership therein, nor is it a tax upon sales generally. The act limits the tax to sales

> at any exchange, or board of trade, or other similar place, and its fair meaning is to impose a duty upon those privileges or facilities which are there found and made use of in the sale at such place of any product or merchandise.

The authority of these decisions is not questioned. So far as interstate-commerce questions are concerned, they are consistent not only with the theory upon which they are based, of special and *local* facilities to trade, but also because all transactions on an exchange are necessarily intrastate, as brokers are primarily responsible each to the other for the full amount of the purchase. The unnamed principals are only secondarily interested in the matter. Plainly, therefore, the purchase and sale of the stocks on the floor of the stock exchanges or on the boards in the Union Stock Yards is not interstate, and therefore does not negative my argument that if a purchase and sale of corporate stock be directly and strictly interstate that it is within the interstate-commerce clause of the Constitution. If a citizen of New York sells to a citizen of Pennsylvania a hundred head of cattle, and ships them from New York to Philadelphia, it is plainly a transaction of interstate commerce. Why is it less so if the same man sells to the same man a hundred shares of Pennsylvania Railroad stock? The stock is as much property as the cattle. If it were a question of relative value, the stock is more important than the cattle. In each case the element of physical transportation is necessarily involved. I submit, therefore, that sales of shares of stock, when interstate, constitute interstate

commerce, even though such certificates represent only an intangible, but none the less substantial, interest in property.

If that be so, its application to these cases is apparent. In the Champion case, tickets representing an interest in a lottery to be drawn were being transported from Texas to California; and in the Francis case similar tickets, representing interests in a lottery, were being transported from Kentucky to Ohio. Congress has seen fit to make it a crime to cause these tickets to be transported from State to State. Why should not this be equally within its power as the right to regulate or prevent the transportation of diseased cattle or obscene literature?

THE POWER TO REGULATE IS THE POWER TO PROHIBIT.

On the oral argument of the Champion case a member of the court asked me, in substance, how I justified my conclusion that the right to regulate commerce included the right to prohibit commerce in a given article. Anticipating this suggestion, I had to some extent discussed it in my first brief, pages 53 to 60, inclusive. Supplementing what I then said, let me add that the right to prohibit commerce in a given article as a regulation thereof can not be seriously questioned if regard be had to the history of the Constitution. Its framers were thoroughly familiar with restrictive commercial statutes, and had good reason to know that the power to regulate included the power to prohibit. They had felt the full force of

such prohibitory commercial regulations of commerce. Laws had been passed which prohibited the exportation of wool, or any manufacture thereof, from any American colony and the exportation of manufactures of iron, except crude. Virginians were forbidden to ship their tobacco to a port of any other country except England. The New England shipowners were prohibited from engaging in foreign trade, and the South Carolinians from shipping their rice to European ports north of Cape Finisterre. The sugar act of 1732 forbade the importation of foreign sugar, molasses, or rum into any colonial port. The evasion of these restrictive commercial statutes led to the search warrants and writs of assistance, and from these came the Revolution.

When the colonies formed the confederation they recognized that the right to regulate commerce included the right to prohibit, as a necessary incident, and even the exigencies of a most critical situation could not persuade them to vest in the federation the power to regulate foreign commerce. It was soon perceived that the confederation could not negotiate advantageous commercial treaties if the commercial advantages which they conferred upon foreign nations could be destroyed at will by the reserved commercial power of the component States, and that, therefore, the power to regulate in the manner that independent nations at that day regulated their commerce must of necessity be given to the federal government. This thought was pressed home when, in 1783, England

commenced to regulate its commerce with the federation by excluding under prohibitions the importation into the British West Indies of much important merchandise from America. For the very purpose of counteracting this blow to our commerce by retaliatory measures, Congress recommended, on April 30, 1784, to the States to vest in the confederation for the term of fifteen years authority to *prohibit* the vessels of any power, not having treaties of commerce with the United States, from importing or exporting any commodities into or from any of the States; also with the power of prohibiting for a like term any foreign country, unless authorized by treaty, from importing into the United States any merchandise not the product or manufacture of such country. So clearly, however, did the States perceive that the power to regulate was the power to prohibit, that they acted upon the recommendation with great reluctance. In the meantime the States were preying upon the trade of each other by prohibitory tariffs and restrictive statutes until commercial chaos resulted and civil war was threatened. Out of this condition, and because of it, came the constitutional convention of 1787.

When, therefore, the framers of the Constitution considered the commerce clause of the Constitution they must have recognized that the power to regulate was the same general and unlimited power which other independent nations had at that time exercised, and included the right to prohibit commerce in any special article, when advantageous for the general commercial interests of the nation.

This is shown beyond question when we consider the great compromises of the Constitution. *So clearly did the framers recognize that the power to regulate commerce would include the power to prohibit, that they inserted an express exception to such power.*

Article I, section 9, provides:

> The immigration or importation of such persons as any of the States now existing shall think proper to admit shall not be *prohibited* by Congress prior to the year 1808, but a tax or duty may be imposed on such importation, not exceeding $10 for each person.

Without the concession of this exception the Constitution could not have been adopted, and it seems, therefore, clear that the framers were of the opinion that after 1808, Congress could, under the power to regulate foreign commerce, prohibit the importation of slaves.

The commercial power of the Union was a concession of the South to the North, and the right to import slaves until after 1808 was the price paid for it. We know how heated was the debate which preceded the great compromise, and that it finally resulted in a reference, on motion of Gouverneur Morris, to a committee of one from each State If the power to regulate did not include the right to prohibit, all this discussion in the Constitutional Convention was a case of "Much ado about nothing"—a very tempest in a teapot. Is this conceivable? Were the delegates from the North, who insisted upon the power to prohibit the importation of slaves as a regulation of commerce, and the

delegates from the South, who struggled with equal tenacity to reserve the importation of slaves, equally in error as to their own meaning? And when they united upon the compromise which gave unlimited commercial power as to all objects except the slave trade, and as to that after 1808, were they both the subject of a gigantic delusion?

In the light of these facts the words of Marshall must be weighed, when in *Gibbons* v. *Ogden* he said that the power to regulate commerce "is complete in itself; may be exercised to its utmost extent, and no limitations thereof are prescribed in the Constitution."

At the time of the Revolution, moreover, the power to tax had been used as a power to regulate and prohibit commerce. I have already shown in my original brief, page 58, that the Fathers did not question the constitutionality of taxes which were designed to regulate commerce. I have also pointed out in the same brief, page 58, that the constitutionality of protective tariff duties, which were even prohibitive, has always been sustained under the commerce clause of the Constitution. The letter there referred to, of James Madison to Joseph C. Cabell, of September 18, 1828 (Writings of James Madison, vol. 3, p. 636), contains a strong exposition of the constitutionality of prohibitive tariff duties as a regulation of commerce. Mr. Madison, in discussing the question, said:

> It is a simple question under the Constitution of the United States, whether "the power to regulate trade with foreign nations," as a distinct and substantive item in the enumerated

> powers, embraces the object of encouraging, by duties, restrictions, and *prohibitions*, the manufactures and products of the country.

With his accustomed learning, he proceeds to answer the question in the affirmative by giving eight distinct reasons for his conclusion, to which I refer the court if the question admit of doubt.

This court has held that the absence of a Federal regulation of interstate commerce is to be regarded as its declaration that such commerce shall be free, and as the States are thereby denied the right to prohibit or regulate such commerce, except by strictly police measures, this doctrine carries with it, as a necessary implication, an equal power in the Federal Government to deny freedom of commerce in a given article. It is possible that the power to regulate commerce would not include the power to prohibit *all* commerce. It is not necessary to decide that abstract question; it is enough to say that the power to regulate *all* commerce includes the power to prohibit commerce in a given commodity.

In his brief for appellant in the Champion case, Mr. Guthrie admits that Congress has ample power not only to prevent the introduction of foreign lottery matter, but in order to render such inhibition perfect it may prohibit the passage from one State to another just as fully as it may prohibit the possession or transfer of smuggled imports or contraband goods. He proceeds to cite various prohibitory provisions with respect to foreign commerce, and, appreciating how pertinent their

validity must be to that of prohibitory regulations of interstate commerce, he proceeds to attempt to draw a distinction between the power to regulate the two classes of commerce. Unfortunately for his contention, the two grants of power are set forth in the same section of the Constitution and by precisely identical language; and were the identity of the power in doubt, the decisions of this court are conclusive. If citation is necessary, I refer to *Crutcher* v. *Kentucky* (141 U. S., 57), in which Mr. Justice Bradley says, *inter alia:*

> It has frequently been laid down by this court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce. * * * And the same thing is exactly true with regard to interstate commerce as it is with foreign commerce. No difference is perceivable between the two.

His argument is therefore based upon a false premise.

Mr. Outcalt in his brief suggests an ingenious argument that although lottery tickets were commercial commodities at the time of the adoption of the Constitution, that such tickets have ceased to be commercial commodities and can not, therefore, be the subject of Congressional regulation. The logic of this argument is that although Congress in 1800 could have regulated such commerce, the Congress of 1900 may not do so, not because the Constitution has changed, but because conditions have changed. Counsel base their premise that lottery tickets have ceased to be commercial commodities upon two premises: (1) That they

"rest to-day under the ban of repressive and prohibitive constitutional provisions or legislative enactment in every State of the Union." (2) The business, so-called, of lotteries is "just as much a thing of the past as the institution of slavery." The first statement may be true. If true, it has only been true in very recent years. If true, it is likely to be untrue at no distant day, as I am advised that several Western States are considering the advisability of giving legal sanction to lottery enterprises. So far as this premise is concerned, it is obvious that if the police legislation of one State can not destroy a commodity that is bought and sold the world over as an article of commerce, the legislation of all the States can not do so. If they could, the commercial power of the Union would be subordinate to the police power of the States, which could, at will, remove articles from Congressional legislation by internal police statutes. In this connection appellants' counsel are guilty of an inconsistency. After admitting that obscene literature is a commercial commodity, they justify prohibitive statutes on the ground that the prohibition of obscene literature is a regulation of commerce and not an attempt to regulate morals. This statement is somewhat surprising. On their argument, however, obscene literature must have ceased to be an article of commerce inasmuch as every State has a law against obscene literature, whereas counsel agree that obscene literature is an article of commerce, and therefore an appropriate subject of Congressional regulation when interstate.

Counsels' second premise that the lottery business is as much a past institution as slavery, has nothing in the record to substantiate it, and is contradicted by the common knowledge of men. Not only are lotteries conducted all over the world at this day, and under the auspicies of many reputable governments, but in this country the lottery business still exists to a surprising extent, and will continue to exist, the police laws of the States to the contrary notwithstanding, as long as the channels of foreign and interstate commerce are open to such lotteries. "'Tis true, 'tis pity, and pity 'tis 'tis true."

REPLY TO MR. EDMUNDS'S BRIEF.

Since dictating the within brief, I am in receipt of the supplemental brief in the Francis case submitted by Mr. Edmunds in behalf of the appellants. Without pretending to answer all of his points (most of which have been already discussed in this or preceding briefs), I venture to refer very briefly to several of the propositions advanced by Mr. Edmunds.

First. He suggests, in the first place, that a lottery ticket is but the evidence of a contract, and that interstate contracts are not within the commercial power of the Union. Assuming the last statement to be correct, a lottery ticket is more than a contract; it is, as I have argued, a *thing* having an intrinsic and exchangeable value. It is true that in a certain sense it is a contract, just as a bond or a share of stock is a contract, but custom has impressed upon a bond or corporate share, as it has upon a railroad ticket or a lottery

ticket, the character of a commodity. As such shares and bonds are daily sold to the value of many millions of dollars, and as the title to these valuable forms of property passes by delivery, it is difficult to distinguish in principle between their sale and the sale of any other chattel.

Mr. Edmunds further says (p. 5):

> If this attempt to deal with the social conduct and condition of the people of the States be upheld, there is no phase of life in the States any element or incident of which involves the passing of persons or things from one State to another that does not fall within the power of Congress to control according to its own discretion. It may make it a crime for any person to cross the line between two States on Sunday, although the two States may have made peaceful entrance lawful on that day, and, conversely, it may authorize all business intercourse between two States to be carried on on the Sabbath, contrary to the laws of both.

This is an extreme and erroneous statement of the Government's contention. The lottery act does not pretend to regulate the social conduct of the people of the States with reference to the purchase of lottery tickets, or to say that lotteries themselves are illegal. If it had attempted to prohibit a citizen of a State from conducting a lottery, or from purchasing an interest in a lottery, it would have clearly trespassed on the police power of the States. The statute simply prohibits interstate traffic in lottery tickets, a wholly different thing, and leaves the people of the

States at liberty to permit or forbid lotteries within their own boundaries. There is no analogy whatever between the suppression of interstate traffic in a thing which is the subject of purchase and sale and a statute forbidding a person from crossing the boundaries of a State on Sunday. The one deals with the right of entry into a State, and has no necessary relation whatever to commerce; the other deals with a necessary incident to interstate traffic in purchasable commodities.

Second. I agree with Mr. Edmunds that "the police power as controlling the conduct of the citizens of the several States and affecting their social order was not conferred upon Congress, excepting so far as it related to places and persons within its exclusive jurisdiction." And also that "it would be a perversion of the history and purpose of the Constitution to hold that the representatives of the States undertook, in framing the Constitution, to transfer the power in respect of the subjects of internal commerce to the discretion of Congress."

These principles are not applicable to the present case. If it be a fact, as can not be gainsaid, that there is an interstate commerce in lottery tickets, then such commerce is "within the exclusive jurisdiction of Congress," and there is no suggestion of any right in this act of Congress to control the "internal commerce" of a State in lottery tickets. They may legislate on this subject as their conceptions of morality or wisdom suggest. Congress simply provides that interstate traffic shall cease.

In this connection it is well to remember that this act was not passed to conflict with or trespass upon the police powers of the State. On the contrary, it was obviously designed to be supplemental to, and a valuable auxiliary of, such police power. Just as the Wilson Act, which was sustained in *In re Rahrer* (140 U. S., 545), was designed to make effective the police statutes of the State where prohibitory liquor laws were in force, this act of Congress was obviously intended to assist the various States in their attempt to suppress the lottery traffic. It is well known that all such attempts on the part of States have largely failed for the want of Congressional action with respect to interstate commerce. As long as lottery matter can be imported from other States, or from foreign countries, the local statutes of such States will be ineffective. So fully is this recognized that one western State has recently considered the wisdom of repealing its prohibitory statutes with reference to lotteries and authorizing a lottery as a fiscal agency of the State, in imitation of France, Austria, and other European nations, and the chief argument for such legislation has been that as it has been impossible to prevent the people of the States from purchasing lottery tickets where the situs of the lottery is in a foreign country or in another State, it would be better for the State to have its own lottery, and thus guarantee the fairness of its administration. *Indeed, the importance of these cases is that if this act be declared unconstitutional, and there be no power in Congress to suppress interstate commerce in lotteries,*

*then the demoralization of these business enterprises can not be successfully combated. Is it possible that the Federal Government is so impotent that when it sees the channels of interstate commerce used as a means to strike down the police powers of the State that it can not by auxiliary legislation assist the States in their laudable purpose of suppressing this demoralizing business? This court in In re Rahrer, above cited, sustained the power of the Federal Government to lend its power in aid of State legislation; and the principle there vindicated with respect to liquors, about whose use men reasonably differ, may well be applied to interstate traffic in lotteries, about whose pernicious effects thoughtful men are in entire accord.*

Respectfully submitted.

JAMES M. BECK,
*Assistant Attorney-General.*

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# In the Supreme Court of the United States.

OCTOBER TERM, 1902.

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THE LOTTERY CASES.

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JOHN FRANCIS ET AL., PETITIONERS,
*v.*
THE UNITED STATES. } No. 293.

CHARLES F. CHAMPION, APPELLANT,
*v.*
JOHN C. AMES, UNITED STATES MARSHAL. } No. 9.

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## REVISED BRIEF FOR THE UNITED STATES ON THIRD ORAL ARGUMENT.

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**For the convenience of the court, I have revised and consolidated the three briefs heretofore filed by me in the above-entitled cases, and I respectfully ask that the present brief be accepted as a substituted brief. It contains the substance of the preceding briefs, omitting such portions as, upon further reflection, seem unimportant, and adding some additional suggestions for the consideration of the court.**

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## I.

### STATEMENT OF CASES.

The above-entitled cases raise, in different forms, a question of importance affecting the exact nature of interstate commerce and the extent of the Federal power with respect to it. Both cases arise under criminal proceedings instituted by the United States under the act of March 2, 1895 (28 Stat. L., 963), the material portion of which act is as follows:

**Act of March 2, 1895.**

CHAP. 191.—AN ACT For the suppression of lottery traffic through national and interstate commerce and the postal service subject to the jurisdiction and laws of the United States.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any person who shall cause to be brought within the United States from abroad, *for the purpose of disposing of the same*, or deposited in or carried by the mails of the United States, or *carried* from one State to another in the United States, any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, to be brought into the United States, or deposited in or carried by the mails of the United States, or transferred from one State to another in the same, shall be punishable in the first offense by imprisonment for not more than two years or by a fine of not

more than one thousand dollars, or both, and in the second and after offenses by such imprisonment only.

In both cases the charge is one of conspiracy to "*carry*" lottery tickets from one State to another.

Statement of Champion case.

In the Champion case, the complainant avers, in substance, that the said Charles F. Champion (the appellant), W. F. Champion, and Charles B. Park did then and there unlawfully, knowingly, and feloniously conspire together to commit an offense against the United States, to wit, *for the purpose of disposing of the same, to cause to be carried from one State to another in the United States, to wit, from Dallas, in the State of Texas, to Fresno, in the State of California*, certain papers, certificates, and instruments purporting to be and representing tickets, as they then and there well knew, chances, shares, and interests in and dependent upon the event of a lottery thereafter to take place, offering prizes dependent upon lot and chance, etc.

An averment of an overt act charges that the defendants "did then and there, to wit, on or about the day last aforesaid, in the year 1899, in the county of Dallas aforesaid, in the Dallas division of the northern district of Texas aforesaid, unlawfully, knowingly, and feloniously, *for the purpose of being carried from one State to another in the United States, to wit, from Dallas, in the State of Texas, to Fresno, in the State of California, for the purpose of disposing of the same, deposit and cause to be deposited and shipped and carried with and by the Wells-Fargo Express Company, a corporation engaged in*

*carrying freight and packages from station to station along and over lines of railway and from Dallas, Texas, to Fresno, California, for hire, one certain box or package containing, among other things, two whole tickets or papers or certificates of said purported Pan-American Lottery Company."*

Among the testimony offered before the United States commissioner was the box of lottery matter, which it was charged in the original indictment had been transported contrary to law. It consisted of tickets, advertisements, circular letters, official drawings, and other matter showing the nature of the lottery and the manner in which it was conducted. The ticket, which will be found on page 71 of the record, and which may be taken as a sample, provides as follows:

PAN-AMERICAN LOTTERY COMPANY.

CAPITAL PRIZE $32,000.

This WHOLE Ticket entitles the holder thereof to the WHOLE of such prize as may be drawn by its number in the within-named drawing, if presented before the expiration of three months from the date of said drawing.

The record thus presents a single question, and that is the constitutionality of section 1 of the act of March 2, 1895. It is not questioned that sufficient testimony was offered to justify the commissioner in committing the defendant to await an order of removal, if the act of Congress referred to be a constitutional exercise of power. Nor is it questioned that the acts complained of are within the meaning of the

said act of Congress. (See appellant's brief, filed by Rosenthal & David, page 3.)

Statement of Francis case.

In the Francis case the defendants, the present petitioners, were convicted in the district court of the United States for the southern district of Ohio, upon an indictment which charged, in substance, that they, the said defendants, "did then and there unlawfully, knowingly, and feloniously conspire together and with one another to commit an offense against the United States, to wit, *to cause to be carried from one State to another in the United States, to wit, from the city of Newport, in the State of Kentucky, to the city of Cincinnati, in the State of Ohio, papers, certificates, and instruments purporting to be and to represent, as they then and there well knew, ticket chances, shares, and interests in and dependent upon the event of a lottery*," etc.

A trial was had, and evidence was offered to prove that the defendants were engaged in a form of lottery known as "Policy."

The lottery set forth in the Francis case differed in method from that set forth in the Champion case in one respect, that whereas in the Champion case, as in an ordinary lottery, the purchaser of a ticket secured such number as the company gave him prior to the drawings, in the Francis case the purchaser selected his own combination of numbers, of which he made duplicate slips, forwarding one to the company on the payment of his fee and retaining the other as evidence of his chance. If, in the drawings, his number were selected, the duplicate slip of paper which he retained was his ticket, and as such entitled to the prize.

The principal office of the lottery was located in a building in Cincinnati, Ohio, at which the drawings took place. The management maintained in various other States, among them Newport, Ky., offices or agencies at which tickets or chances in the drawing could be purchased. The extent of the enterprise can be measured by the fact that the drawings were transmitted by wire to over sixty agencies, located in New Haven, Conn.; Chicago, Ill.; Indianapolis, Ind.; Boston, Mass.; Detroit, Mich.; Buffalo, N. Y.; New York City, Cleveland, Ohio; Columbus, Ohio; Dayton, Ohio; Hamilton, Ohio; Springfield, Ohio; Fort Wayne, Ind.; Toledo, Ohio; Philadelphia, Pa.; Allegheny, Pa.; Providence, R. I.; Hartford, Conn.; Rosslyn, Va., and other places. To avoid arrest by Federal or State authorities, the business was conducted with all possible secrecy. The tickets were conveyed from the agencies in the various States to Cincinnati, and after the drawings were made, the results were telegraphed by a cipher code from Cincinnati to the agencies, at which point the prizes, if any, were distributed to the holder of the original slips in each State. The testimony abundantly established the defendants' connection with the enterprise. Reilley was in charge of the office, Hoff had charge of the agency in Newport, Ky., and Edgar was employed to carry the slips from Newport, Ky., to Cincinnati, and the prizes, if any, from Cincinnati to Newport. Evidence was offered to prove that an agency of this lottery company was maintained by one of the defendants, Hoff, in a barber

shop at Newport, Ky., and that Harrison, one of the witnesses for the Government, called there and made up his slip, which represented his interest or chance in the lottery, and delivered a duplicate copy thereof to Hoff and paid him the necessary amount; that shortly thereafter Edgar, one of the defendants, who was employed as carrier for the lottery company, came to Hoff's shop, took the ticket, and then started across the bridge which separates Newport, Ky., from Cincinnati, Ohio, and at the end of the bridge was arrested by the officers of the Cincinnati police force and searched, and upon his person was found the ticket which represented Harrison's interest in the lottery. The slip of paper, while informal in character, "represented the interest of the purchaser of a chance, and although containing figures only, it had a definite meaning and was understood by all the parties concerned." (Opinion of circuit court of appeals.) The law always has regard to the substance rather than to the form, and this is especially true in the enforcement of its criminal statutes, for otherwise they could be easily evaded. It is clear that the slips of paper, although containing nothing more than figures, did entitle the holder thereof to an interest in the lottery, the value of which was dependent upon the actual drawing, and that such ticket, like a bond or an ordinary lottery ticket, was transferable on delivery.

The defendants were convicted, and thereupon sued out a writ of error to the circuit court of appeals for the sixth circuit, alleging that the act of March 2, 1895,

was unconstitutional. The case was argued before Lurton, Day, and Severens, circuit judges, who, in an opinion by the last-named judge, affirmed the constitutionality of the act. (See Transcript of Record, page 359.)

The Francis and the Champion cases do not differ in principle, and both involve the constitutionality of the act of March 2, 1895.

## II.

### ANTI-LOTTERY LEGISLATION.

The attempt of Congress to legislate lotteries out of existence had its commencement in the act of July 27, 1868 (15 Stat., 196), which provided, section 13, "that it shall not be lawful to deposit in a post-office, to be sent by mail, any letters or circulars concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes of any kind on any pretext whatever." Supplemental acts were passed on June 8, 1872 (17 Stats. at L., 302), and July 12, 1876 (19 Stat., 9), and September 19, 1890 (26 Stat., 465), all of which were designed to make the exclusion of lottery matter from the mails more effective.

Large quantities of this matter continued to be imported as merchandise from lottery companies in other countries, and accordingly Congress, by the act of August 27, 1894, the Wilson tariff act (28 Stat., 509), provided by section 10 "that all persons are prohibited from importing into the United States from any foreign country * * * any lottery ticket or any advertisement of any lottery. No such articles,

whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles shall be proceeded against, seized, and forfeited by due course of law." The lottery companies, notably those having their home office in other countries, continued clandestinely to smuggle their lottery matter into the United States, and, as the mails were closed to them, they continued to ship as merchandise their matter through the various States by means of express companies and other common carriers of freight. This continued defiance of the law led Congress to close the channels of interstate trade to this traffic by passing the act of March 2, 1895 (28 Stat., 963).

The material section of the act has already been quoted. (*Infra*, p. 2.)

## III.

### JUDICIAL CONSTRUCTION OF ANTI-LOTTERY LEGISLATION.

Before passing to a discussion of the constitutionality of the act of 1895, it may be desirable to briefly review the decisions of this court and the circuit court of appeals as to the previous legislation.

The acts of Congress excluding lottery matter from the mails have been under discussion in *Ex parte Jackson*, 96 U. S., 727; *In re Rapier*, 143 U. S., 110, and *Horner* v. *United States*, No. 1, 143 U. S., 207.

In none of these cases did the question of the right to exclude lottery matter from interstate traffic under the interstate-commerce clause of the Constitution arise.

All of them were cases where the United States mails, a purely governmental agency, were used as a means of conveyance, and the constitutionality of the acts was sustained on the ground that the right to establish post-offices and post-roads included the right on the part of Congress to designate what should and what should not be carried by this governmental agency. It is true that Mr. Justice Field, in *Ex parte* Jackson, did question the power of Congress to prevent the transportation, as merchandise, of matter excluded from the mails. But, apart from the fact that this expression of a doubt was purely *obiter*, and in no respect necessary to the facts of the case, it must be further remarked that it was predicated upon a case where the *conveyance of the unlawful matter was purely within the borders of a State. No reference was made in the arguments and none in the opinions of the court, either in Ex parte Jackson or the subsequent cases, to the interstate-commerce clause of the Constitution, and these cases, therefore, can not be regarded as authority in the present case, except to the extent that they affirm the right of Congress to exclude matter which, in its discretion, is injurious to the public morals, and such exclusion does not abridge the freedom of the press.*

In *France* v. *United States* (164 U. S., 676), the precise question arose, but the court decided the case upon another point, and the constitutionality of the act of March 2, 1895, was left undecided. The only cases, therefore, which directly pass upon the question are the cases at bar, in both of which the decisions of

the respective courts sustained the constitutionality of the act of Congress.

## IV.

### SYNOPSIS OF ARGUMENT.

I shall discuss two questions in this brief which seem to comprehend all others:

First. WHAT IS THE NATURE OF INTERSTATE COMMERCE, AND DOES IT INCLUDE THE CARRIAGE FROM STATE TO STATE OF LOTTERY TICKETS?

Second. DOES THE POWER TO REGULATE INCLUDE THE POWER TO PROHIBIT?

As to the first question, I submit three propositions:

(1) The transit of individuals from State to State is interstate commerce.

(2) The carriage of things for hire from State to State by any means of transportation is commerce.

(3) Lottery tickets are articles of commerce.

## V.

### HISTORY OF COMMERCE CLAUSE.

Before discussing these three propositions, it is well to remember the history of the commerce clause of the Constitution.

Prior to the formation of the Federation, the thirteen British colonies, while united in a sense by their common allegiance to the British Crown, were as between themselves independent political entities, and as against

each other sovereign and independent. (Note 2, Madison's Papers, Gilpin, 686.) Excepting the supervisory power of the Crown over trade regulations, there was no general authority over either foreign or intercolonial commerce. The result was a mass of conflicting and hostile legislation.

So jealous were the States of their commercial power, that even the Articles of Confederation, framed for the purpose of prosecuting a common war, contained no general authority over commerce, except that "no imposition, duties or restriction shall be laid by any State on the property of the United States or either of them," and "no State shall lay any imposts or duties which may interfere with any stipulations in treaties entered into by the United States in Congress assembled." While Congress was authorized to "enter into treaties and alliances," it was provided that "no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners as their own people are subject to, or from *prohibiting* the exportation or importation of any species of goods or commodities whatsoever." A prohibition, therefore, was regarded as a regulation of trade.

It was soon perceived that the Confederation could not negotiate advantageous commercial treaties if the commercial advantages which they conferred upon foreign nations could be destroyed at will by the reserved commercial power of the component States, and that, therefore, the power to regulate trade in the manner that independent nations at that day regu-

lated their commerce, *i. e.*, by restrictions and prohibitions, must of necessity be given to the Federal Government. This thought was pressed home when, in 1783, England commenced to regulate its commerce with the federation by excluding under *prohibitions* the importation into the British West Indies of much important merchandise from America. For the very purpose of counteracting this blow to our commerce by retaliatory measures, Congress recommended, on April 30, 1784, to the States to vest in the confederation for the term of fifteen years authority to *prohibit* the vessels of any power, not having treaties of commerce with the United States, from importing or exporting any commodities into or from any of the States; also with the power of *prohibiting* for a like term any foreign country, unless authorized by treaty, from importing into the United States any merchandise not the product or manufacture of such country. In the meantime the States were preying upon the trade of each other by prohibitory tariffs and restrictive statutes until commercial chaos resulted and civil war was threatened. Out of this condition, and because of it, came the constitutional convention of 1787.[a]

[a] The situation is thus described by Madison in his Introduction to the Journal of the Federal Convention:

"The want of authority in Congress to regulate commerce had produced in foreign nations, particularly Great Britain, a monopolizing policy, injurious to the trade of the United States and destructive to their navigation, the imbecility and anticipated dissolution of the Confederacy extinguishing all apprehensions of a countervailing policy on the part of the United States. The same want of a general power over commerce led to an exercise of the power separately by the States, which not only proved abortive, but engendered rival, conflicting, and angry regulations.

Hamilton early in the session of the Constitutional Convention submitted a plan of the proposed constitution, which gave to Congress absolute power over commerce under the sweeping power "to pass all laws whatsoever." Paterson presented the "New Jersey plan," which gave to Congress authority "to pass acts for the regulation of *trade and commerce* as well with foreign nations as with each other." Governor Randolph proposed to confer upon Congress power "to regulate commerce with all nations and among the several States;" and the plan suggested by Charles Pinckney upon the subject of commerce was precisely in the same language as that of Randolph. (2 Madison Papers, 863.)

The distinction between "trade" and "commerce," as suggested by Paterson, will be noted as indicating that in the minds of the framers "commerce" was a term of much broader signification than "trade," as

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Besides the vain attempts to supply their respective treasuries by imposts, which turned their commerce into the neighboring ports, and to coerce a relaxation of the British monopoly of the West Indian navigation, which was attempted by Virginia, the States having ports for foreign commerce, taxed and irritated by adjoining States trading through them, as New York, Pennsylvania, Virginia, and South Carolina. Some of the States, as Connecticut, taxed imports from others, as from Massachusetts, which complained in a letter to the executive of Virginia, and doubtless to those of other States. In sundry instances, as of New York, New Jersey, Pennsylvania, and Maryland, the navigation laws treated the citizens of other States as aliens. In certain cases the authority of the Confederacy was disregarded, as in violation, not only of the Treaty of Peace, but of treaties with France and Holland; which were complained of to Congress. In other cases the Federal authority was violated by treaties and war with Indians, as by Georgia; by troops raised and kept up without the consent of Congress, as by Massachusetts; by compacts without the consent of Congress, as between Pennsylvania and New Jersey, and between Virginia and Maryland. From the Legislative Journals of Virginia it appears that a vote refusing to apply for a sanction of Congress was followed by a vote against the communication of the compact to Congress."

Marshall subsequently decided in *Gibbons* v. *Ogden*. (See post, page 19.)

Profoundly as the framers differed in other respects, it is therefore clear that all plans agreed in this, that the absolute power which each constituent State had theretofore had over its external relations, of whatsoever nature, and which was denominated by the comprehensive word "commerce," should pass to the Federal Government. No residuum was left in the States. The purpose clearly was to empower Congress "to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legistation." (2 Madison Papers, 859.)

To remedy these evils the constitutional convention of 1787 was called, and so clearly were all delegates agreed as to the wisdom of taking from the thirteen States all control over their external relations, whether intercolonial or foreign, that the clause of the Constitution which was designed to effectuate this (art. 7, sec. 1) was passed without a dissenting voice and with comparatively little debate. While they did not in this section define commerce, yet they threw a searchlight on their meeting in a subsequent section, whose history clearly reveals their purposes.

On the 6th of August, 1787, a draft of a constitution was reported to the convention by Mr. Rutledge from the committee of detail. In Article VII, section 4, of that draft, it was provided that "no tax or duty shall be laid by the legislature on articles exported

from any State; nor on the *migration or importation* of such persons as the several States shall think proper to admit; nor shall such migration or importation be prohibited." This clause limits the tax power as to such migration or importation of persons, and then denies power to prohibit such migration or importation. The tax or duty laid was aimed at the slave trade, which was permitted to continue until 1808, but the latter words have no reference to the tax power at all. To what, then, could these words refer, except as a limitation on the commerce power, under which alone Congress could have had a pretense for the prohibition of the migration or importation of persons. The clause was referred with others to a committee. On the 24th of August, 1787, the clause was reported thus: "The migration or importation of such persons as the several States, now existing, shall think proper to admit shall not be prohibited by the legislature prior to the year 1800; but a tax or duty may be imposed on such *migration* or importation at a rate not exceeding the average of the duties laid on imports." Gouverneur Morris remarked on this as a power to tax freemen migrated or imported. George Mason replied: "The provision as it stands was necessary for the case of convicts, in order to prevent the introduction of them." The latter clause was then amended, *nem. con.*, so as to read: "But a tax or duty may be imposed on such *importation*, not exceeding $10 for each person." A tax or duty was imposed on the person imported as a slave, but the migration of free persons might be prohibited after 1800.

These proceedings show that the power to tax slaves and not freemen was granted, and the power to prohibit the migration of free persons as well as slave importation was granted by clear implication, the implication of power to prohibit the migration of free persons being under the power to regulate commerce, and to prohibit commerce in slaves after the date stated. This makes the commercial power reach to the prohibition of the migration of persons and the importation of things. These views are confirmed by many cases; so that it seems to be the clear meaning of the Constitution that the words "to regulate commerce" include the regulation of migration of persons irrespective of their relations to things in commerce. (Tucker on the Constitution, p. 525.)

The power, therefore, that was taken from the States and vested in the United States was the power of each constituent State over its external relations, and in its transfer to the Federal Government it was in no respect diminished, except by certain express limitations in the Federal compact, such as the prohibition of any preference of the port of one State over the port of another State (art. 1, sec. 9, par. 6) and the prohibition of duties upon exports (art. 1, sec. 9, par. 5) and of clearance duties (art. 1, sec. 9, par. 6).

*With these minor limitations the delegated power was as exhaustive and plenary as that which it was intended to supersede. The question, therefore, as to what commerce is under the Federal Constitution necessarily depends upon what commerce was regarded to be by the colonies prior to*

*the formation of the Constitution. Commerce meant the intercourse or intercommunication of a colony with the other colonies and the rest of the world either by the importation or exportation of goods or by the ingress or egress of individuals, and was not confined to mere traffic in purchasable commodities.*

With this historical résumé of the commerce clause of the Constitution, I pass to my first proposition, which is:

VI.

**1. The transit of individuals from State to State is interstate commerce.**

This view of the nature of commerce was accepted by this court in the leading case of *Gibbons* v. *Ogden* (9 Wheat., 1), and, far from being weakened, has been supported and confirmed by subsequent adjudications until it should be regarded as beyond controversy.

Gibbons v. Ogden, 9 Wheaton, 1.

The facts of this familiar case need not be mentioned except to note that the matter in dispute was the *exclusive right* of navigation of a tidal river, and it was contended by the appellant that such exclusive privilege was void and that it was an infringement of the exclusive power of Congress to regulate interstate commerce. This leading case, therefore, turned upon an abstract right which affected the *transit of individuals* quite as much as the transportation of merchandise. The question at once arose whether commerce was only traffic or all intercourse, whether for purposes of sale or not. Mr. Oakley urged that commerce is only "transportation and sale of commodities," while Mr. Emmett gave the definition as "the

exchange of one thing for another, the interchange of commodities, trade, or traffic." Mr. Wirt claimed in reply that it "*always implies intercommunication and intercourse.*" This last definition was adopted by the court in the oft-quoted definition of the Chief Justice, as follows:

> The subject to be regulated is commerce; and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power it becomes necessary to settle the meaning of the word. *The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.* The mind can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

Of Marshall's wonderful judicial qualities nothing is more striking than his accurate use of language, and to understand this illuminating decision the court must

consider in its full significance the meaning of th word "intercourse" as contrasted with "traffic." All traffic is undoubtedly intercourse, but all intercourse is plainly not traffic. Its full meaning is seen in its derivative, for *inter-cursus* means a running between or intercommunication, which concept has no necessary relation to the purchase and sale of commodities. It is thus defined by the Century Dictionary:

> 1. Communication between persons or places; frequent or habitual meeting or contact of one person with another, or of a number of persons with others, in conversation, trade, travel, etc.; physical interchange; reciprocal dealing, as the *intercourse* between town and country.
>
> At the last shall ye come to people, cities, and towns wherein is continual *intercourse* and occupying of merchandise and chaffare.
>
> *Sir T. More*, Utopia (tr. by Robinson), i.
>
> Euen then when in Assyria it selfe it corrupted by *entercourse* of strangers.
>
> *Purchas*, Pilgrimage, p. 47.
>
> By which (bridge) the spirits perverse
> With easy *intercourse* pass to and fro.
>
> *Milton*, P. L., ii., 1031.
>
> 2. Mental or spiritual interchange; reciprocal exchange of ideas or feelings; intercommunion.
>
> Food of the mind (talk) or this sweet *intercourse*
> Of looks and smiles.
>
> *Milton*, P. L., ix, 238.
>
> Thou wast made for social *intercourse* and gentle greetings.
>
> *Sterne*, Sentimental Journey, p. 54.
>
> The neighboring Indians in a short time became accustomed to the uncouth sound of the Dutch language, and an *intercourse* gradually took place between them and the new comers.
>
> *Irving*, Knickerbocker, p. 101.
>
> His *intercourse* with heaven and earth becomes part of his daily food.
>
> *Emerson*, Nature.

If Marshall had occasion, in using this term, to consult his dictionary he would doubtless have verified his use of the language by Dr. Johnson's dictionary, where we find intercourse defined as:

> 2. Communication. "The choice of the place requireth many circumstances, as situation near the sea, for a commodiousness of an *intercourse* with England." *Bacon.*

In this larger sense, commerce means the communication of a nation with the outer world, through the transitus of individuals or the carriage of goods, and upon such contact commerce in its narrower sense of traffic must ultimately depend.

Marshall clearly saw that intercommunication between different nations, whether it took the form of the transportation of merchandise or the transit of individuals, or the transmission of intelligence, was the appointed path to commercial independence and greatness. At that time ships were its chief instrumentality. The first railroad was not constructed until some years after *Gibbons* v. *Ogden* had been decided, but the ships, whether bringing passengers to our shores or cargoes of merchandise, were the shuttles which, passing through the warp and woof of nations, weaved the sublime pattern of civilization. This is doubly true of this age of steam and electricity, when the States of the Union are indissolubly bound together by shining paths of steel, aggregating two hundred thousand miles in length. These lines of communication are the arteries through which the life blood of the nation courses, and the telegraph wires are the sensitive nerves of our complex social system. Commerce is

the lifeblood of intercommunication, and comprehends every object to which the steamship, the railroad, the telegraph, or other form of conveyance can be applied, and the transportation of merchandise, which is intended for sale, is but one of many incidents to this comprehensive view of commerce, as Marshall's clear insight saw it.

Even more pointed is the following language of Mr. Justice Johnson's concurring opinion in *Gibbons* v. *Ogden:*

> When speaking of the power of Congress over navigation, I do not regard it as a power incidental to that of regulating commerce; I consider it as the thing itself; inseparable from it as vital motion is from vital existence.
>
> Commerce in its simplest signification means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange become commodities, and enter into commerce; the subject, the vehicle, the agent, and their various operations become the objects of commercial regulation. Shipbuilding, the carrying trade, and propagation of seamen are such vital agents of commercial prosperity that the nation which could not legislate over these subjects would not possess power to regulate commerce.

This leading case, therefore, clearly established that commerce was more than traffic; that it was intercourse, and comprised intercommunication between the peoples of one country and another, whether by shipment of commodities, the transmission of intelli-

gence, or by personal ingress and egress, and the sovereign power which each State formerly possessed over such external communication was the power which it delegated, subject to the limitations above averted to, to the Federal Government.

The precise question as to whether the transit of persons, whether traveling for commercial purposes or not, was commerce, arose and was earnestly discussed in the *Passenger cases* (7 Howard, 282), argued by Webster and Choate, in which the health commissioners of the port of New York placed a tax upon each cabin and steerage passenger arriving at that port from foreign countries. The whole subject of the commercial power of the Union was, as the court well knows, exhaustively reviewed by all of the justices in separate opinions, and the conclusion reached that the *mere entry of passengers into a port is commerce, although such passenger may come and go without any special reference to the purchase or sale of commodities.* As to what commerce is, Mr. Justice McLean says: Passenger cases, 7 How., 282.

> Commerce is defined to be "an exchange of commodities." But this definition does not convey the full meaning of the term. It includes "navigation and intercourse." That the transportation of passengers is a part of commerce is not now an open question.

He directly negatives the suggestion that passengers, not being imports, their transportation therefore can not be commerce.

Mr. Justice Wayne, after criticising the dictum in *City of New York* v. *Miln* (11 Pet., 102) that persons

"are not the subject of commerce," reaffirms the definition of commerce contained in *Gibbons* v. *Ogden*.

Mr. Justice Grier, in his opinion, argued that if the States had the power to exclude aliens one of the chief objects for which the Union was formed had totally failed, and he adds:

> Commerce, as defined by this court, means something more than traffic—it is intercourse; and the power committed to Congress to regulate commerce is exercised by prescribing rules for carrying on that intercourse.

He clearly holds that the mere ingress and egress of foreigners into this country is commerce. He says (p. 151):

> The power, then, to tax, and the power to regulate commerce, give to Congress the right to tax persons who may come into the United States, as a regulation of commerce and navigation. I have already mentioned, among the restraints which nations may impose upon the liberty or freedom of commerce, those which may be put upon foreigners coming into or residing within their territories. This right exists to its fullest extent, as a portion of the commercial rights of nations, when not limited by treaties.

Mr. Justice Catron, in his concurring opinion, says:

> The Constitution is a practical instrument, made by practical men, and suited to the territory and circumstances on which it was intended to operate. To comprehend its whole scope the mind must take in the entire country and its local governments. * * * New

States were in contemplation far off from ports on the ocean, *through which ports aliens must come to our vacant territories and new States*, and through these ports foreign commerce must of necessity be carried on by our inland population. We had several thousand miles of seacoast; we adjoined the British possessions on the east and north for several thousand miles, and were divided from them by lines on land to a great extent; and on the west and south we were bounded for three thousand miles and more by the possessions of Spain. With neither of these Governments was our intercourse by any means harmonious at that time. *Provision had to be made for foreign commerce coming from Europe and other quarters by navigation in pursuit of profitable merchandise and trade, and also to regulate personal intercourse among aliens coming to our shores by navigation in pursuit of trade and merchandise, as well as for the comfort and protection of visitors and travelers coming in by the ocean.*

Then, again, on our inland borders, along our extensive lines of separation from foreign nations, trade was to be regulated; *but more especially was personal intercourse to be governed by standing and general rules, binding the people of each nation on either side of the line.*

Mr. Justice McKinley in his opinion says:

The power to prohibit the admission of "all such persons" includes, necessarily, the power to admit them on such conditions as Congress may think proper to impose; and therefore as a condition Congress has unlimited power of tax-

ing them. If this reasoning be correct, the whole power over the subject belongs exclusively to Congress, and connects itself indissolubly with the power to regulate commerce with foreign nations.

County of Mobile v. Kimball, 102 U. S., 691.

In *County of Mobile* v. *Kimball* (102 U. S., 691), this court again affirmed the suggestion that not only was transportation of passengers commerce without respect to the purpose of the traffic, *but that the mere transit of persons and property was commerce.* In that case Mr. Justice Field, in one of his illuminating opinions, said:

> Perhaps some of the divergence of views upon this question among former judges may have arisen from not always bearing in mind the distinction between commerce as strictly defined, and its local aids or instruments, or measures taken for its improvement. Commerce with foreign countries and among the States, strictly considered, consists in *intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities.*

Gloucester Ferry Case, 114 U. S., 196.

In *Gloucester Ferry Company* v. *Pennsylvania* (114 U. S., 196, 203), Mr. Justice Field said:

> Commerce among the States consists of intercourse and traffic between their citizens, and *includes the transportation of persons and property,* and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities.

In *Pickard* v. *Pullman Southern Car Company* (117 U. S., 34), Mr. Justice Blatchford, speaking for the court, thus sums up the effect of the decisions (p. 48):

Packard v. Car Company, 117 U. S.

> The decisions in the various cases in this court on the subject of a tax by a State on the bringing in of passengers from foreign countries, and which are collected and commented on by Mr. Justice Miller, in delivering the opinion of this court in the *Head Money cases* (112 U. S., 580, 591), show it to be a settled matter that to tax *the transit of passengers from foreign countries or between the States is to regulate commerce.*

If any doubt existed whether the transit of individuals was commerce, *irrespective of the means of locomotion*, it was set at rest by this court in the case of *Covington Bridge Co.* v. *Kentucky* (154 U. S., 204, 218), where it was held that the mere passage of foot passengers from one side of the Ohio River to the other side is commerce. In this opinion Mr. Justice Brown said:

Covington Bridge Co. v. Kentucky, 154 U. S., 204.

> Commerce was defined in *Gibbons* v. *Ogden* (9 Wheat., 1, 189) to be 'intercourse,' *and the thousands of people who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool.* While the bridge company is not itself a common carrier, it affords a highway for such carriage, and a toll upon such bridge is as much a tax upon commerce as a toll upon a turnpike is a tax upon the traffic of such turnpike, or the charges upon a ferry a tax upon the commerce across a river.

To sustain the appellants' contention that the conveyance of lottery tickets for hire from State to State is not interstate commerce would be to overrule the Covington Bridge case, already cited, in which the court held that "the thousands of people who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool." It is no answer to suggest that that involved an interstate highway in the form of a bridge, for it is obvious that the passage of citizens did not become commerce because they crossed an interstate highway, but the bridge was an instrumentality of commerce because of the transit of the people. If, therefore, the passage of a citizen over a bridge leading from Cincinnati, Ohio, to Covington, Ky., is commerce, assuredly it can not be less commerce if the passenger has a lottery ticket in his pocket, which he is carrying for hire. Nor can the power to regulate such commerce be less in one case than the other.

The Telegraph Cases.

Indeed, neither the transit of individuals nor the transportation of goods are essential to commerce. The mere transmission of intelligence is also commerce.

Pensacola Tel. Co. vs. Co., 96 U. S. 1.

The invisible messages which are transmitted along telegraph lines from citizens of one State to citizens of another are commerce. In *Pensacola Telegraph Company* v. *The Westernt Union Telegraph Company* (96 U. S., 1) an act of Congress was under question which provided for the construction of telegraph lines. It was held to be a valid regulation of commerce and

to be superior to a statute of Florida which gave to the Pensacola Telegraph Company the exclusive right of operating telegraph lines in that State. Mr. Chief Justice Waite delivered the opinion of the court, in the course of which he said:

> Since the case of *Gibbons* v. *Ogden* (9 Wheat., 1) it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. Post-offices and post-roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the National Government.

Western Union Tel. Co. vs. Pendleton, 122 U. S. 347.

In *Western Union Telegraph Company* v. *Pendleton* (122 U. S, 347) a statute of the State of Indiana which required telegraph companies to deliver dispatches by messenger to the addressees, under certain conditions, was held to be in conflict with the interstate-commerce clause of the Constitution as an attempt to regulate the delivery of such dispatches. Mr. Justice Field alludes to the fact that the telegraph messages held to be within the commercial power of the Union are invisible and intangible. He says:

> Although *intercourse* by telegraph messages between the States is thus held to be interstate commerce, it differs in material particulars from that portion of commerce with foreign countries and between the States which consists in the carriage of persons and the transportation and exchange of commodities, upon which we have

been so often called to pass. It differs not only in the subjects which it transmits, but in the means of transmission. *Other commerce deals only with persons, or with visible and tangible things. But the telegraph transports nothing visible and tangible; it carries only ideas, wishes, orders, and intelligence. Other commerce requires the constant attention and supervision of the carrier for the safety of the persons and property carried. The message of the telegraph passes at once beyond the control of the sender, and reaches the office to which it is sent instantaneously.*

In *Ratterman* v. *Telegraph Company* (127 U. S., 411), and *Leloup* v. *Port of Mobile* (127 U. S., 640), the same rulings were followed.

It must be remembered in this connection that there is no essential difference between foreign commerce and interstate commerce except as to the terminus *a quo* and the terminus *ad quem*. In both instances the idea of commerce is the same. Nothing is clearer than that the mere transit of persons arriving at our ports of entry is, without reference to traffic, the subject of Congressional regulation, because it is commerce. Thus, in

People v. Compagnie, 107 U. S., 59.

*People* v. *Compagnie Générale Transatlantique* (107 U. S., 59), a statute of New York imposing a tax on an alien passenger arriving in this country from a foreign country was held to be unconstitutional because an undue interference with commerce, and this notwithstanding the fact that the statute declared in its title that its purpose was to raise money for the execution

of the inspection laws of the State. Mr. Justice Miller denied that "the words 'imports and exports' are used in that instrument (the Constitution) as applicable to free human beings by any competent judicial authority," and held that a freeman could not be regarded as property. The court, after holding that the word "migration" in section 9, Article I, of the Constitution, referred to entrance into this country of a free black man, decided that such entry into this country was commerce without reference to any possible connection with traffic.

Head Money Cases, 112 U. S., 580.

In the *Head Money Cases* (112 U. S., 580, 591) the constitutionality of the act of August 3, 1882, to regulate immigration, was under discussion. This act imposed a duty of fifty cents on every passenger, not a citizen of this country, and this court held that it was a valid exercise of the power to regulate commerce with foreign nations.

Henderson v. Mayor, 92 U. S., 259.

In *Henderson* v. *Mayor* (92 U. S., 259) a statute of New York was under consideration, which compelled the master of a ship carrying foreigners to this country to carry out certain regulations for the supposed protection of the State. Mr. Justice Miller, after reviewing the decision of *Gibbons* v. *Ogden*, says, page 270:

> Since the delivery of the opinion in that case, which has become the accepted canon of construction of this clause of the Constitution, as far as it extends, the transportation of passengers from European ports to those of the United States has attained a magnitude and importance far beyond its proportion at that time to other

branches of commerce. It has become a part of our commerce with foreign nations of vast interest to this country, as well as to the immigrants who come among us to find a welcome and a home within our borders.

Nishimura v. U. S., 142 U. S., 651.

In *Nishimura Ekiu* v. *United States* (142 U. S., 651) the constitutionality of the act of March 3, 1891, which forbids certain classes of alien immigrants to land in the United States, was under consideration. This court held that the entrance of aliens into our country was commerce, and while it did not place the power to forbid such entrance exclusively upon the commerce clause of the Constitution, the court, in the opinion, said (p. 659):

> It (the power to exclude aliens) belongs to the political department of the Government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress, upon whom the Constitution has conferred power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods, and the bringing of persons into the ports of the United States."

Again, Mr. Justice Gray says:

> The supervision of the admission of aliens into the United States may be intrusted by Congress either to the Department of State, having the general management of foreign relations, *or to the Department of the Treasury, charged with the enforcement of the laws regulating foreign commerce.*

If the transit of persons from a foreign country to our country is commerce without respect to the purpose of their entrance into this country, then the same must be true of the transit of persons from State to State, assuming that foreign commerce is the same as interstate commerce, with the exception of the *locus in quo*. That they are identical is clearly established by the decisions of this court:

In *Gibbons* v. *Ogden*, Mr. Justice Johnson said (9 Wheat., 228):

> But the language which grants the power as to one description of commerce, grants it as to all; and, in fact, if ever the exercise of a right, or acquiescence in a construction, could be inferred from contemporaneous and continued assent, it is that of the exclusive effect of this grant.

In *Brown* v. *Houston*, 114 U. S., 630, the court say: Brown v. Houston, 114 U. S., 630.

> The power to regulate commerce among the several States is granted to Congress *in terms as absolute* as is the power to regulate commerce with foreign nations.

Mr. Justice Matthews, delivering the opinion of the court in *Bowman* v. *Chicago, etc., Railway Co.* (125 U. S., 482), said: Bowman v. Chicago, 125 U. S., 482.

> The power conferred upon Congress to regulate commerce among the States is indeed contained in the same clause of the Constitution, which confers upon it power to regulate commerce with foreign nations. The grant is conceived in the same terms, and the two powers

are undoubtedly of the same class and character *and equally extensive.*

Crutcher v. Kentucky, 141 U. S., 47.

In *Crutcher* v. *Kentucky*, 141 U. S., 47, 58, Mr. Justice Bradley said:

> It has frequently been laid down by this court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce. * * *
>
> The prerogative, the responsibility, and the duty of providing for the security of the citizens and the people of the United States in relation to foreign corporate bodies or foreign individuals with whom they may have relations of foreign commerce belong to the Government of the United States and not to the governments of the several States; and confidence in that regard may be reposed in the National Legislature without any anxiety or apprehension arising from the fact that the subject-matter is not within the province or jurisdiction of the State legislatures. And the same thing is exactly true with regard to interstate commerce as it is with regard to foreign commerce. *No difference is perceivable between the two.*

Pitts. Coal Co. v. Bates, 156 U. S., 587.

Mr. Justice Field said, in *Pittsburg Coal Co.* v. *Bates*, 156 U. S., 587:

> *The power to regulate commerce among the several States was granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations.*

The identity of the Federal power with respect to these two classes of commerce, so clearly confirmed by

the above decisions, is in no respect shaken by the excerpt from the opinion of Mr. Justice McLean in *Groves* v. *Slaughter*, 15 Peters, 449, 505, which is cited by Mr. Guthrie in support of his proposition that the power over foreign commerce is more extensive than the power over interstate commerce. While Mr. Justice McLean concurred in the judgment in that case, yet, so far as the reasoning of the majority of the court was concerned, his opinion was in effect a dissenting opinion, and it is enough to say that his attempt to distinguish between the extent of the Federal power over the two classes of commerce was repudiated by this court in the subsequent decisions to which reference has already been made.

Groves v. Slaughter, 15 Peters, 449.

This case must therefore be decided on the assumption that the power is identical over the two classes of commerce, and as the power to regulate the transit of individuals in foreign commerce has been repeatedly confirmed by the court, it necessarily follows that the same right exists with reference to the transit of individuals in interstate commerce. To rule otherwise would be to overrule an established doctrine of this court as to the identity of the power above referred to.

## VII.

**2. The carriage of things for hire from State to State by any means of transportation is commerce.**

It is not necessary for the Government in the present cases to argue that the mere passage of a citizen from one State to another *for his own purposes* is commerce.

The cases at bar involve a narrower and less doubtful question. We need only contend that *transportation of property for hire* from State to State is commerce. The method of transportation is wholly unimportant. Conveyance of property for hire by a rowboat is as much commerce as by a the largest steam ship, and a wheelbarrow may be as completely an instrument of commerce as an express train. Transportation may be by hand and still be commerce. The telegraph boys, who delivered messages by hand, were engaged in commerce (see *Western Union Telegraph Company* v. *Pendleton*, *supra*), and the carriage of a pound of tea from Cincinnati, Ohio, to Newport, Ky., by a grocer boy is as much commerce between those States as the passage of the longest freight train.

In the cases at bar the carriage of things from State to State for hire is involved.

In the Champion case a *box* containing lottery tickets was transported by the Adams Express Company, through the agency of a common carrier, from Texas to California; and in the Francis case an individual, who was employed to carry the tickets from Kentucky to Ohio, crossed the boundary of those two States for the purpose of conveying the thing. We have, therefore, here not merely the transit of persons from State to State, as to which Mr. Justice Brown, in *Covington Bridge Company* v. *Kentucky* (154 U. S., 204, 218), said was commerce (*infra*, page 27), but we have the transportation for hire of a thing, and I contend that without respect to the character of the thing,

which is wholly unimportant, the fact of transportation, whether by railroad or other vehicle, or by hand, for hire, is commerce. And for this simple proposition I need only quote the words of Mr. Justice Johnson, in *Gibbons* v. *Ogden* (*infra*, page 22), where he said:

> *But it is almost laboring to prove a self-evident proposition, since the sense of mankind, the practice of the world, the contemporaneous assumption and continued exercise of the power, and universal acquiescence, have so clearly established the right of Congress over navigation and the transportation of both men and their goods as not only incidental to but actually of the essence of the power to regulate commerce.*

The force of this declaration is in no way broken by the preceding sentence, in which the Justice is speaking of navigation, for while navigation by ships was the instrumentality of commerce most familiar to the framers of the Constitution, yet it is obvious that any means of transportation is equally within the purview of the Constitution. That instrument was made for all time, and has adapted itself and will adapt itself to all the means of transportation which the ingenuity of man can devise; none is too great and none is too small to be within its power. Whether the transportation of goods is by railroad, steamship, airship, wagon, wheelbarrow, or, as in the Francis case, by hand, in all cases and equally the transportation of a thing from State to State for hire is, as Mr. Justice Johnson said, the very "essence of commerce." Such being the fact, it is

difficult to understand why a statute of the United States, which prohibits the carriage of lottery matter from State to State, is not a constitutional exercise of the power, for "carriage" is synonymous with "transportation," and to attempt to discriminate between the means of such transportation would be unwarranted judicial legislation by reading a qualifying clause into the Constitution. The appellants' contention in these cases, if affirmed by this court, would necessarily lead to an obvious inconsistency. Take, for example, the Champion case. The box of matter which was shipped from Dallas, Tex., to Fresno, Cal., paid freight rates, and unquestionably the Interstate Commerce Act can apply to it as to any other thing which the railroad carried. Congress could regulate the rates for which it would be carried, could prohibit and punish discrimination by the company between different men who would ship boxes containing lottery matter; it could compel reports from the carrying company showing the rate for which the box was carried. To hold that the Government could have no constitutional power over the carriage of the matter because the box contained lottery tickets, and at the same time to hold that interstate commerce could apply to it as any other shipment, would be an inconsistency at once glaring and absurd. It is no answer to say that the power of the Government over the shipment was because the railroad was an instrumentality of commerce and recognized as such, because it only is held to be such instrumentality because the fact of

transportation is of the essence of commerce, and the means of instrumentalities of transportation are, therefore, brought within the Federal power. In other words, transportation does not come within the Federal power because it is carried on by a railroad, but the railroad comes within the Federal power because it engages in interstate transportation, and the fact of such transportation is the very "essence" of commerce.

*A fair test of the soundness of the appellants' contention is to ask whether the State of California could lawfully have passed a law taxing the transportation of the box of lottery matter from Dallas, Tex., to Fresno, Cal., or could the State of Ohio have taxed the carriage of the policy ticket from Newport, Ky., to Cincinnati, Ohio. Their impotence to do so is predicated on the theory that such carriage is commerce.*

If Congress can pass an act providing that the train which bore the lottery matter from Dallas, Tex., to Fresno, Cal., shall have a certain form of brake or coupler, it can not lack the power to prohibit the train from carrying any particular kind of freight.

Even assuming that a lottery ticket was not an article of commerce, yet, in determining whether transit or transportation are commerce, it is not practicable to distinguish between the subject-matter of the transportation or the purpose of the transportation. For purposes of Federal commerce, transportation in any form is treated as a unit. *The entry into our country of all passengers is commerce, whether they come here to trade*

*with us or not. The transmission of all telegraph messages from State to State is commerce, whether the messages refer to commercial transactions or not. Similarly, the transportation of all freight for hire must be commerce, even if the thing conveyed for hire be not an article of commerce in itself.* Such is the clear effect of the passenger and telegraph cases, to which extended reference has already been made. I submit, therefore, that as transportation is commerce—as "inseparable from it as vital motion is from vital existence" (Mr. Justice Johnson, in *Gibbons* v. *Ogden*)—this view is determinative of the questions involved.

## VIII.

### LOTTERY TICKETS ARE ARTICLES OF COMMERCE.

But, assuming that the character of the thing conveyed or transported is an important question, I submit that lottery tickets—title to which pass by delivery and which from time immemorial have been subject of barter and sale—are articles of commerce.

In the first place, Congress has held them to be articles of commerce, and this court has ruled that the judgment of the legislative branch of the Government is, in this respect, controlling upon the judiciary. In this respect there is a clear distinction between the effect of State statutes and acts of Congress. Unquestionably no State statute, by any declaration as to what is an article of commerce, could trench upon the supreme authority of the Federal Government with regard to commerce, and therefore State statutes which have sought to prohibit altogether certain forms of traffic

have been held not to divest the articles in question of their commercial character, or to forbid their importation into a State in the original package. But when Congress, by legislation, recognizes a traffic in a given form of property, the judiciary will not question the *fact* of such traffic or the commercial character of the article thus bought or sold, but will simply consider whether Congress has exceeded its authority with reference to the subject-matter of the legislation. This was clearly held in *Leisy* v. *Hardin* (135 U. S., 100), where the present Chief Justice said:

Leisy v. Harden, 135, U. S. 100.

> *Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we can not hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized* can be controlled by State laws amounting to regulations while they retain that character; although at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them.

And again, *in re Rahrer* (140 U. S., 545), the present Chief Justice negatives the contention that State legislatures had power to determine what was legal commerce, and says:

In re Rahrer, 140 U.S., 545.

> If this be the true construction of the constitutional provision, then the paramount power of Congress to regulate commerce is subject to a very material limitation; *for it takes from Congress and leaves with the States the power to deter-*

*mine the commodities or articles of property which are the subjects of lawful commerce.*

I have already referred to existing legislation which deals with lottery tickets as articles of commerce (*infra*, pp. 8, 9). It will there be seen that the traffic has been recognized as one to be regulated since 1868, when the mails were closed for its purposes; and that by the Wilson tariff act of 1894, it was recognized as an existing importation which should be prohibited, and which, if the law were violated, could be the subject of forfeiture and seizure as any other import. The existing legislation itself is a legislative declaration that an extensive traffic does exist in lottery matter, and that it is largely effected through the medium of foreign and interstate commerce. I submit therefore, under the authorities above cited, that the judicial department of the Government should not review this declaration of the legislative branch as to the commercial character of a lottery ticket.

Without regard to this legislative declaration, however, it seems clear that lottery tickets are articles of commerce in the sense that they are things which have been for many generations the subjects of barter and sale. It is true that under the stress of repressive legislation the traffic in them in this country has materially lessened, but the necessity of legislation under consideration clearly manifests that the traffic has by no means ceased, and is already of sufficient magnitude to justify the National Legislature in closing the channels of foreign and interstate commerce to this merchandise.

The fact that the United States and the various States have seen fit to make that illegal which was before legal can not in any way affect the character of lottery tickets as articles which have been for centuries the subject of purchase and sale. Whether an article is or is not an article of commerce is dependent, not upon the question of its noxiousness or usefulness, nor upon the question whether the States have prohibited it within their borders in the exercise of their police power, but upon the fact as to whether such articles have been, in the ordinary and usual channels of trade, the subjects of purchase and sale. It is not a question of opinion as to their utility or morality. It is a question of fact. Any article that men buy or sell is an article of commerce, and as such within the power of Congress when its exchange is interstate in its character. A State has the right under the reserved police power to protect its citizens against injury or fraudulent sales, even by excluding articles of commerce. High explosives or unwholesome articles of food are articles of commerce, but as their introduction into a State may endanger the lives and comfort of the citizens, the method of such introduction may be regulated by State legislation, where such legislation is plainly within the legitimate ends of the police power. But such regulation does not make the article less an article of commerce. The introduction of dynamite may be regulated to an extent which is practically exclusive, but dynamite is none the less an article of commerce. Putrid meat is an article of commerce. It is bought and sold as a fertilizer or as a material for

soap. It is not, however, fit for food, and any State legislation regulating its introduction into the State, while valid as an exercise of police power, can not make it less an article of commerce. It is true that this court has at times spoken of such articles as not articles of commerce, but it only meant by such expressions to mean that such articles, which endanger the lives and comfort of citizens, have no commercial rights superior to the police power of inspection reserved to the States. The only test as to whether a given article is an article of commerce is whether it is, or has been, customarily the subject of purchase and sale, and this must be determined by considering whether such an article is recognized as a subject of purchase and sale by the commercial world.

Schollenberger v. Pa., 171 U. S., 1.

It was said in the case of *Schollenberger* v. *Pennsylvania* (171 U. S., 1, 7, and 8):

> In the examination of this subject the first question to be considered is whether oleomargarine is an article of commerce. No affirmative evidence from witnesses called to the stand and speaking directly to that subject is found in the record. We must necessarily determine the question with reference to those facts which are so well and universally known that courts will take notice of them without particular proof being adduced in regard to them, and also by reference to those dealings of the commercial world which are of like notoriety.

It is a fact of common notoriety that from the beginning of the Republic to the present day lottery

tickets have been the subject of general purchase and sale in this and all civilized countries. If further proof is needed than our common knowledge, the statutes of the United States and the decisions of the courts afford ample corroboration of this fact.

It is also a fair inference that the legislation which prevailed both in State and nation in the last century and at the beginning of the present, and which almost uniformly authorized such lotteries for all purposes, public and private, religious, political, and philanthropic, carried with it a recognition that at that time lottery tickets were recognized as a proper and legitimate subject of purchase and sale. To the fathers who framed the Constitution the purchase of lottery tickets was a matter of everyday occurrence, and carried with it no moral reflection whatever. Such lotteries were conducted by distinguished officials, authorized by laws, and sanctified even to sacred uses, for it is a matter of common knowledge that not merely public works, such as canals, bridges, public buildings, and schoolhouses, but also churches, were built by means of lotteries. For example, the steeple of Christ Church in Philadelphia was built by a lottery in which pulpit and pew were alike engaged. Thus the first American Congress provided (see 2 Stat., 726) that the corporation of the city of Washington shall have full power to authorize the drawing of lotteries for effecting any important improvement in the city which the ordinary funds or revenue thereof will not accomplish;

provided, that the object for which the money is intended to be raised is first submitted to the President of the United States and shall be approved by him. Under this act of Congress ten successive lotteries were annually held by the Government from 1812 to 1821, and in all of them the President of the United States was a participant to the extent that the purposes for which the money was thus raised were submitted to and approved by him. It is a great mistake to suppose that a lottery ticket conveyed no right of action or property interest. Whatever is the present effect upon such commercial commodities of restrictive legislation, they formerly conveyed unquestioned property rights which could be enforced in courts of law. *Clark* v. *The Mayor of the City of Washington* (12 Wheat., 40).

In considering the nature of a lottery ticket it is well to distinguish between the abstract legal idea of such a ticket and its commercial or popular nature. For commercial purposes it must be regarded in the light in which it is bought and sold. And, so viewing it, it is more than a piece of paper; it is a *thing* which not merely evidences value, but which carries value with it when bought and sold or transported. Before the drawing takes place it has value in the hands of its possessor; he can obtain value for it, and such value increases or diminishes as the result of the drawing affects it. To transfer title to it requires no indorsement, and no written assignment is necessary and no consent is required

to such transfer on the books of the company. It is more than a contract; more than a certificate of a share of corporate stock; more than a bond. It is the *thing* itself, which, from time immemorial, has been bought and sold and has value as such. Thus, the present ticket says, "This whole ticket entitles the *holder* thereof to the whole of such prize," etc. As such, it was a thing of value, which passed property of value from man to man by mere physical delivery, and which was bought and sold by men as a thing of inherent value. In buying and selling such articles men are not guided by refined and metaphysical distinctions such as may trouble the legal mind, and the popular conception of a lottery ticket should determine in giving it its true character as an article of commerce.

To appellant's suggestion that lottery tickets are only the evidence of value, and not an intrinsically valuable commodity, we reply that the commercial power of the Union can extend to written instruments, where they affect or are instruments of the purchase and sale of property interests. Thus in the case of *Almy* v. *California* (24 Howard, 169) a duty upon a bill of lading was held to be unconstitutional; and while the Almy case was placed on the mistaken ground that goods shipped from San Francisco to New York were exports, yet in the subsequent case of *Woodruff* v. *Parham* (8 Wall., 123) the decision was placed on the true ground that the tax was void as a regulation of commerce; and the two cases, therefore, established that a tax on a written instrument, which

Almy v. California, 24 Howard, 169.

Woodruff v. Parham, 8 Wall., 123.

is of itself of no intrinsic value and which simply represents title, and which is ordinarily used in the purchase and sale and interstate transportation of commodities, is a regulation of interstate commerce, and if imposed by a State is void. See also the later case of *Fairbanks* v. *United States* (181 U. S., 283).

Fairbanks v. U. S., 181 U. S., 283.

A ticket is certainly not more intangible or less valuable than a telegraph message, which is neither visible nor tangible. It appears in the Champion case that the telegraph was largely used in giving the results of the drawings to the various agencies throughout the country. It can not be questioned, in view of the telegraph cases, that the transmission by the defendants in the Champion case of the drawings of the lottery over the telegraph wires was commerce. Is it, then, open to question that the conveyance of the ticket, which represented the interest in the lottery, and which had a property value as such, and which was vendable by mere physical delivery, is equally commerce? If a citizen of Pennsylvania sells to a citizen of New York United States bonds, and ships the bonds to him by express, and obtains in return the purchase price, is not this as much a commercial transaction as though a barrel of wheat and not a bundle of bonds were the subject of the traffic?

The Insurance Cases.

The only cases that seem to militate against this theory are the so-called Insurance cases,[a] and upon these

[a] *Paul* v. *Virginia*, 8 Wall., 168 (1868); *Ducat* v. *Chicago*, 10 Wall., 410 (1870); *Liverpool Insurance Company* v. *Massachusetts*, 10 Wall., 566 (1870); *Philadelphia Fire Association* v. *New York*, 119 U. S., 110 (1886); *Hooper* v. *California*, 155 U. S., 648 (1894); *Allgeyer* v. *Louisiana*, 165 U. S., 578 (1896); *New York Life Insurance Company* v. *Cravens*, 178 U. S., 389 (1900).

the appellants seem to place their chief reliance. I submit that there is an obvious distinction between a lottery ticket or a bond and a policy of insurance, for the reason that the former are usually the subjects of purchase and sale, whereas policies of insurance are not customarily the subject of purchase and sale. It is true that a policy of insurance can be assigned to one having an insurable interest, but according to commercial usage policies of insurance are not bought and sold in the sense that bonds or lottery tickets are.

The Insurance cases, carefully read, are not authority for the proposition that a written instrument, like a bond or lottery ticket, which passes title to property upon delivery, may not be a commercial commodity. It will be noticed that this court has never had the question squarely presented whether Congress may enact legislation regulating the interstate insurance business. In reading the court's opinion upon these Insurance cases the question actually presented to the court must be kept in mind. (*Woodruff* v. *Parham*, 8 Wall., 123, 138.) The precise point decided is that the insurance business is not so commercial in character that a State is obliged to admit such foreign insurance corporations. The foundation of all these decisions was that such corporations, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created, and that, therefore, their right to do business in another State depends upon the grace of such State, which can impose terms or restrain altogether.

A careful examination of all of these cases will further disclose the fact that each of them was predicated upon the fact that the method of transacting the business made the transactions *intra-state* and not *interstate*. The contract of insurance was completed within the borders of the State in which the insured had his domicile, the insuring company acting through a local representative, of whom Mr. Justice White said, in *Hooper* v. *California*, 155 U. S., 648, that "in the discharge of his business he is the representative of both parties to a certain extent."

Hooper v. California, 155 U. S., 648.

This will be clearly seen by reference to the leading case, upon which all the others is based, namely, *Paul* v. *Virginia*, 8 Wall., 168, where Paul, a resident of Virginia and representing in that State certain New York insurance companies, "issued a policy in Virginia in their name to a citizen of Virginia." This court, in an opinion by Mr. Justice Field, said:

Paul v. Virginia, 8 Wall., 168.

> *Such contracts are not interstate transactions, though the parties may be domiciled in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce.*

It is true that certain expressions in *Hooper* v. *California*, supra, might seem to give the doctrine a broader

meaning, but the true doctrine of this case is laid down by this court in the later case of *Allgeyer* v. *Louisiana*, 165 U. S., 578, and is thus stated by Mr. Justice Peckham:

Allgeyer v. Louisiana, 165 U. S., 578.

> *The court held that the whole transaction amounted to procuring insurance within the State of California by Hooper, residing there and for a resident in the State, from an insurance company not incorporated under its laws and which had not filed the bond required by the laws of the State relative to insurance;* that Hooper, the defendant, acted as the agent of his principals in New York City, who were average adjusters and brokers there, and who had a place of business in San Francisco, and that Hooper, as such broker, having applied for the insurance to his principals in New York City, received the policy from them for delivery in San Francisco, and the premium was there paid.

No case has as yet squarely presented an insurance transaction which was not thus effected through a local agency. The nearest approach to it is the Allgeyer case, where a citizen of Louisiana made such a contract in New York upon property which was in Louisiana, and it was held that the State of Louisiana could not restrict his freedom even with reference to property within its legislative power. Whether, if Allgeyer had written directly to the New York company and made his application for insurance, and the New York company had sent him to New Orleans by express a policy of insurance, without the intervention of a local agent, the transaction would become interstate com-

merce has not yet been expressly decided by this court. In such a transaction it is obvious that physical interstate transportation twice takes place. The insured would transport across the State boundary his money for a commercial purpose, and in return there would be a physical transportation of the policy. That this is a commercial transaction in the general sense of the term can hardly be questioned. That it is interstate is likewise obvious. It would seem to be intercourse for commercial purposes between citizens of different States within the meaning of Chief Justice Marshall in *Gibbons* v. *Ogden.*

It is, however, not necessary for the court to pass upon this hypothetical case, which is only given by way of illustration, for the case at bar is clearly distinguishable. An insurance policy is not a commodity. It is not a thing which is customarily bought and sold and recognized as a subject of such exchange. Indeed, public policy forbids its alienation except to the limited class, having an insurable interest. A lottery ticket, however, as has been amply shown, was, at the time of the framing of the Constitution, a subject of purchase and sale in every civilized country, and is to-day to an extent far greater that is generally believed. The physical transportation, therefore, of such lottery tickets is that of an exchangeable commodity, and as such it is a commercial article, and its transportation is commercial in character.

## IX.

### DOES THE POWER TO REGULATE INCLUDE THE POWER TO PROHIBIT?

As to this question I submit three propositions:

(1) That the power to prohibit as a regulation of trade is absolute, except where expressly limited by other sections of the Constitution.

(2) The power to prohibit exists for any purpose referable to the legitimate objects of government, such as the preservation of health, the protection of morals, and the safety of life.

(3) The power to regulate interstate commerce being an express power, with no express restrictions on the prohibition of interstate traffic in a given article, the purposes for which Congress may prohibit, are not reviewable by the courts.

That the power to prohibit is absolute, and the legislature is the final judge of the wisdom of its exercise, seems to be clearly established upon both principle and authority.

I have already referred (infra, pp. 11–18) to the conditions that prevailed prior to the constitutional convention and the familiarity of the colonists with prohibitive trade regulations.

Indeed, the most familiar exercise of the power to regulate commerce in the minds of the men who framed the Federal Constitution was, doubtless, the total or partial prohibition of traffic in particular

articles. This was often accomplished by duties; and those duties, so far as they were laid for prohibition, total or partial, and not for revenue, were regarded as regulations of commerce. Thus Chief Justice Marshall, in his Life of Washington, uses the following language in speaking of the American colonies before the Stamp Act of 1765 (Vol. II, pp. 76–77, 1st ed.):

> In the middle and southern provinces the authority of such of the acts of Parliament of internal revenue as were made for America, as well as those for the regulation of commerce, even by the imposition of duties, provided those duties were imposed *for the purpose of regulation*, had been at all times admitted.

And again the Chief Justice says (Vol. II, p. 81; 1st ed.), speaking of the Stamp Act:

> The colonies had long been in the habit of submitting to duties laid on their trade, and had not generally distinguished between those which were *imposed for the mere purpose of regulating commerce* and this, which, being also designed to raise a revenue, was in truth to every purpose a real tax.

In *Gibbons* v. *Ogden* (9 Wheat., 1, 202), speaking of the constitutional restriction upon the powers of the States in the matter of duties on tonnage, the Chief Justice says:

> It is true that duties may often be, and in fact often are, imposed on tonnage with a view to the regulation of commerce; but they may be also imposed with a view to revenue; and it

> was therefore a prudent caution to prohibit the States from exercising this power. The idea that the same measure might, according to circumstances, be arranged with different classes of power was no novelty to the framers of our Constitution. Those illustrious statesmen and patriots had been, many of them, deeply engaged in the discussions which preceded the war of our Revolution, and all of them were well read in those discussions. *The right to regulate commerce, even by the imposition of duties, was not controverted; but the right to impose a duty* for the purpose of revenue produced a war as important, perhaps, in its consequences to the human race as any the world has ever witnessed.

The remarks of the Chief Justice are fully borne out by history; and the classification of import duties into revenue duties and regulations of commerce lay at the basis of the American doctrine which led to the Revolutionary war. We may refer to the journals of the Continental Congress, vol. 1, pp. 28, 175, 176; vol. 2, p. 189; the examination of Dr. Benjamin Franklin at the bar of the House of Commons on February 7, 1776 (1 Bigelow's Life of Franklin, pp. 478, 479); John Dickinson's "Letters from a Farmer," published in 1768, pp. 15, 18–19, 37–42, 43 (note), 60, 61, 66; Dr. Franklin's letter to Joseph Galloway of February 25, 1775 (8 Spark's Franklin's Works, p. 146); John Adams's letter to Jay of July 19, 1785 (Works of John Adams, vol. 8, pp. 282, 283). The same view was maintained by the leading jurists and statesmen of the first two generations after the adoption of the Constitution; and with

practical unanimity they based the protective tariff duties on the commerce clause of the Constitution. (1 Story on the Constitution, sec. 963; 2 id., 1080 et seq.; James Madison's letter to Joseph C. Cabell of March 22, 1827 (Writings of James Madison, vol. 3, p. 571); his letter to Cabell of September 18, 1828 (id., p. 636); Henry Clay's reply to Barbour, March 31, 1824 (Annals of Congress, p. 1994); Gulian C. Verplanck's letter to Drayton, New York, 1831, pp. 21–23; Speech of Thomas Smith Grimké, etc., Charleston, 1829, p. 51. Mr. Grimké states that (p. 62):

> In 1790 Edmund Randolph, in his opinion to the President, states among the heads of the power to regulate commerce with foreign nations the power to *prohibit* their commodities to impose or increase the duties on them.

In a letter from James Madison to Joseph C. Cabell, September 18, 1828, above referred to, the same thought is expressed. Mr. Madison writes:

> It is a simple question under the Constitution of the United States whether "the power to regulate trade with foreign nations," as a distinct and substantive item in the enumerated powers, embraces the object of encouraging by duties, restrictions, and *prohibitions* the manufactures and products of the country. And the affirmative must be inferred from the following considerations.

He then proceeds to give eight cogent reasons, drawn from the history of the period and from the Constitution itself, why the power to regulate trade

includes the power to encourage our own manufactures by discouraging the importation of foreign manufactures, either by restrictive or absolute prohibitory legislation. Speaking of the conditions that preceded the adoption of the Federal Constitution, he says:

> During the delays and discouragements experienced in the attempts to invest Congress with the necessary powers the State of Virginia made various trials of what could be done by her individual laws. She ventured on duties and imposts as a source of revenue; resolutions were passed at one time to encourage and protect her own navigation and shipbuilding; and in consequence of complaints and petitions from Norfolk, Alexandria, and other places against the monopolizing navigation laws of Great Britain, particularly in the trade *between the United States and the British West Indies*, she deliberated, with a purpose controlled only by the inefficacy of separate measures, on the experiment of forcing a reciprocity by *prohibitory regulations* of her own. (See Journal of House of Delegates in 1785.)

In No. 11 of the Federal Papers Alexander Hamilton writes in support of the Constitution:

> If we continue united, we may, in a variety of ways, counteract a policy so unfriendly to our prosperity. By *prohibitory regulations*, extending, at the same time, throughout the States, we may oblige foreign countries to bid against each other for the privileges of our markets.

Again, he says:

> It has been said that *prohibitions* on our part would produce no change in the system of Britain, because she could prosecute her trade with us through the Dutch, who would be her immediate customers and paymasters, for such articles as were wanted for the supply of our markets.

In a letter written by Edmund Randolph, October 16, 1787, to the speaker of the Virginia house of delegates, he says:

> No sooner is the merchant prepared for foreign ports, with the treasures which this new world kindly offers to his acceptance, than it is announced to him that they are shut against American shipping, or opened under oppressive regulations. He urges Congress to a counter policy, and is answered only by a condolence on the general misfortune. He is immediately struck with the conviction *that until exclusion shall be opposed to exclusion, and restriction to restriction*, the American flag will be disgraced. For who can conceive that thirteen legislatures, viewing commerce under different regulations and fancying themselves discharged from every obligation to concede the smallest of their commercial advantages for the benefit of the whole, will be brought into a concert of action and defiance of every prejudice.

James Winthrop, in a letter dated January 14, 1788, to the Massachusetts convention, said:

> By section 8 of Article 1 Congress are to have the *unlimited right* to regulate commerce,

> external and internal, and may, therefore, create monopolies which have been universally injurious to all the subjects of countries that have adopted them, except the monopolists themselves.

Apart from the history of the period and the utterances of contemporaneous writers, the Constitution itself affords the most convincing proof that the right to regulate included the right to prohibit.

This is shown beyond question when we consider the great compromises of the Constitution. *So clearly did the framers recognize that the power to regulate commerce would include the power to prohibit, that they inserted an express exception to such power.*

Article I, section 9, provides:

> The immigration or importation of such persons as any of the States now existing shall think proper to admit shall not be *prohibited* by Congress prior to the year 1808, but a tax or duty may be imposed on such importation, not exceeding $10 for each person.

Without the concession of this exception the Constitution could not have been adopted, and it seems, therefore, clear that the framers were of the opinion that after 1808 Congress could, under the general power to regulate foreign commerce, prohibit the importation of slaves.

*If the power to regulate did not include* the right to prohibit, all the heated discussion in the Constitutional Convention on the prohibition of the slave trade was a case of "much ado about nothing"—a very tempest in

a teapot. Is this conceivable? Were the delegates from the North, who insisted upon the power to prohibit the importation of slaves as a regulation of commerce, and the delegates from the South, who struggled with equal tenacity to reserve the importation of slaves, equally in error as to their own meaning? And when they united upon the compromise which gave unlimited commercial power as to all objects except the slave trade, and as to that after 1808, were they both the victims of a gigantic delusion?

It can not be contended that the power to prohibit the migration of freemen and the importation of slaves are referable to any other clause in the Constitution. It is clear that the framers of the Constitution regarded it as inherent in the power to regulate trade, and the exception that such legislation should not be made prior to 1808 is the clearest possible statement that after that year the prohibitory regulation could be made under the commerce clause of the Constitution.

The argument from authority seems as conclusive as the argument from the history of the period. The extent of the power was originally laid down by Marshall, in *Gibbons* v. *Ogden*, 9 Wheat., 1, 196, as follows:

> We are now arrived at the inquiry, What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, *may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.*

This doctrine has been reiterated in a very bead roll of authorities and, so far as I know, has never been disputed. In *Clark* v. *Field*, 143 U. S., 649, where the constitutionality of the McKinley bill was under discussion, Mr. Justice Harlan gave the following illustrations of the power of prohibition:

Clark v. Field, 143 U.S., 649.

> The authority given to the President by the act of June 4, 1794, to lay an embargo on all ships and vessels in the ports of the United States "whenever, in his opinion, the public safety shall so require," and under regulations, to be continued or revoked "whenever he shall think proper;" by the act of February 9, 1799, to remit and discontinue, for the time being, the restraints and prohibitions which Congress had prescribed with respect to commercial intercourse with the French Republic, "if he shall deem it expedient and consistent with the interest of the United States," and "to revoke such order, whenever, in his opinion, the interest of the United States shall require;" by the act of December 19, 1806, to suspend, for a named time, the operation of the nonimportation act of the same year, "if, in his judgment, the public interest should require it;" by the act of May 1, 1810, to revive a former act, as to Great Britain or France, if either country had not, by a named day, so revoked or modified its edicts as not "to violate the neutral commerce of the United States;" by the acts of March 3, 1815, and May 31, 1830, *to declare the repeal, as to any foreign* nation, of the several acts imposing duties on the tonnage of ships and vessels, and on goods, wares, and merchandise imported into the United States,

when he should be "satisfied" that the discriminating duties of such foreign nations, "so far as they operate to the disadvantage of the United States," had been abolished; by the act of March 6, 1866, to declare the provisions of the act forbidding the importation into this country of neat cattle and the hides of neat cattle, to be inoperative, "whenever, in his judgment," their importation "may be made without danger of the introduction or spread of contagious or infectious disease among the cattle of the United States," must be regarded as unwarranted by the Constitution, if the contention of the appellants in respect to the third section of the act of October 1, 1890, be sustained.

In the exercise of its power to regulate foreign commerce Congress has never hesitated to prohibit commerce in any particular article, or even to stop foreign commerce altogether, either for a fixed period of time or indefinitely. A well-known instance of partial prohibition is that of obscene literature, which has been part of our laws ever since the tariff act of August 30, 1842 (ch. 270, sec. 28). To the latter class belong the well-known nonimportation and embargo laws of the period prior to the war of 1812. (See *Gibbons* v. *Ogden*, 9 Wheat., 1, 192-193; 2 Story on the Constitution, secs. 1264, 1289, 1290.)

Congress has the same power over interstate commerce as over commerce with the Indian tribes. The *question whether, under its power to regulate commerce* with the Indian tribes, it could exclude any selected article from such commerce as deleterious,

came up for decision in *United States* v. *Holliday* (3 Wall., 407, 416–418), and was decided in the affirmative in an opinion by Mr. Justice Miller. This ruling was reaffirmed in *United States* v. *43 Gallons of Whiskey* (108 U. S., 491), in an opinion by Mr. Justice Davis. Both of these cases related to the statute prohibiting the sale of spirituous liquors, whose constitutionality has since then been assumed without question. (*United States* v. *Le Bris*, 12 U. S., 278; *Sarlls* v. *United States*, 152 U. S., 570; *United States* v. *Maynard*, 154 U. S., 552.)

If Congress can exclude obscene literature from foreign commerce, why not from interstate commerce also; and if it can exclude obscene literature, why can it not exclude lottery tickets? If it can exclude spirituous liquors from commerce with the Indian tribes, why not from interstate commerce also; and if it can exclude spirituous liquors, why can it not exclude lottery tickets?

The principle has in effect already been decided by this court. States have undertaken in the interests of the public health to exclude importations of a certain kind from other States, and their legislation has been held by this court to be unconstitutional. (*Railroad Co.* v. *Husen*, 95 U. S., 465; *Minnesota* v. *Barber*, 136 U. S., 313; *Brimmer* v. *Rebman*, 136 U. S., 78; *Voight* v. *Wright*, 141 U. S., 62.) These laws were not held to be void, because they in effect levied taxes upon imports; for it is well settled that the word "imports" in the Constitution refers only to articles brought in

from foreign countries. (*License cases*, 5 How., 504, 623; *Woodruff* v. *Parham*, 8 Wall., 123; *Brown* v. *Houston*, 114 U. S., 622, 628; *Coe* v. *Errol*, 116 U. S., 517, 526; *Pittsburg Co.* v. *Louisiana*, 156 U. S., 590, 600.)

*The laws were held void because they were regulations of commerce.* But the Constitution does not expressly prohibit States from regulating commerce. It merely gives the power of regulation to Congress. Whenever, therefore, this court has held a State law void as being a regulation of commerce, it has impliedly held that a law to the same effect could constitutionally be passed by Congress; that is, so far as Congress is not restrained by some express prohibition.

The power of Congress to prohibit any particular form of traffic, in its discretion, however, has been recently passed upon in the *Addyston Pipe case* (175 U. S., 211), in which Mr. Justice Peckham said:

> In *Gibbons* v. *Ogden* (*supra*), the power was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution.
>
> Under this grant of power to Congress, that body, in our judgment, may enact such legislation as shall declare void and *prohibit* the performance of any contract between individuals and corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce. (And when we speak of interstate we also include in our meaning foreign commerce.) We do not

assent to the correctness of the proposition that the constitutional guaranty of liberty to the individual to enter into private contracts limits the power of Congress and prevents it from legislating upon the subject of contracts of the class mentioned.

The power to regulate interstate commerce is, as stated by Chief Justice Marshall, full and complete in Congress, and there is no limitation in the grant of the power which excludes private contract of the nature in question from the jurisdiction of that body. Nor is any such limitation contained in that other clause of the Constitution, which provides that no person shall be deprived of life, liberty, or property without due process of law.

And, again, the Justice says:

The provision in the Constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above nature while in the exercise of its constitutional right to regulate commerce among the States. On the contrary, we think the provision regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the Constitution, and that the power of Congress to regulate interstate commerce comprises the right to enact a law *prohibiting* the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally, *and collaterally, regulate to a* greater or less degree commerce among the States.

The legislative history of the United States gives many instances of prohibitory regulations of trade, none of which, to my knowledge, has ever been declared unconstitutional. Reference has already been made to the embargo acts and the prohibitions of trade with the Indians. The exclusion of aliens has already been discussed, and the identity of foreign and interstate commerce established by decisions of this court. (Infra, pp. 33–35.)

Recent familiar instances are the prohibition of the importation of adulterated or unwholesome food or drugs and other things injurious to health (acts of August 30, 1890, March 2, 1897); the importation and exportation of diseased cattle (act of August 30, 1890); the interstate commerce in diseased live stock (act of May 29, 1884); the importation of obscene matter (acts of March 2, 1857, March 3, 1873); the importation of women for immoral purposes (act of March 3, 1875); the importation of persons under contract to perform labor (acts of February 26, 1885, February 23, 1887, March 3, 1891, March 3, 1893); Chinese-exclusion act (July 5, 1884); the immigration of convicts and diseased persons (act of March 3, 1875); the Sherman anti-trust law (act of June 27, 1890); the Lacey bill, prohibiting the interstate transportation of game killed in a State where prohibitory game laws exist (act of May 25, 1900). The Sherman anti-trust law is in itself a prohibition, *pro tanto*, of commerce, but its constitutionality has been affirmed in the cases of *United States* v. *Joint Traffic Association* (171 U. S., 505) and

U. S. v. Joint Traffic Assn., 171 U. S., 505.

*United States* v. *Trans-Missouri Freight Association* (166 U. S., 290). U. S. v. Trans. Miss. Assn., 166 U. S., 290.

In this connection I call especial attention to *In re Rahrer*, 140 U. S., 545. That case evidences very strongly the power of Congress to prohibit interstate trade. The act of August 8, 1890, was passed by Congress with the full knowledge that in certain States of the Union the manufacture and sale of a recognized article of commerce was absolutely prohibited, and to supplement such prohibition Congress enacted "that all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory, or remaining therein for use, consumption, sale, or storage therein shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." In re Rahrer, 140 U. S., 545.

Disregarding the mere form of words, and looking to the substance of this act, in connection with State legislation, it was a virtual prohibition of transportation to that State. It is obvious that the power to pass such a law could not depend in any wise upon the State statute, but must be inherent in Congress, and therefore an absolute prohibition of transportation would have been valid if there had been no State statute. This court held the virtual prohibition of the

transportation of liquors to certain States a valid exercise of constitutional power.

The present Chief Justice says (p. 555):

> The power of Congress to regulate commerce among the several States, when the subjects of that power are national in their nature, is also exclusive. *The Constitution does not provide that interstate commerce shall be free, but by the grant of this exclusive power to regulate it it was left free except as Congress might impose restraint.* Therefore it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several States.

Again, the Chief Justice says (p. 562):

> No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule *which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so.*

Recognizing that the Federal power over commerce could be supplemental to the police powers of the State in conserving the public health or morals, the Chief Justice says (p. 564):

> Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the State laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power

to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction.

In this connection it is well to remember that this act was not passed to conflict with or trespass upon the police powers of the State. Just as the Wilson Act, which was sustained in *In re Rahrer* (140 U. S., 545), was designed to make effective the police statutes of the State where prohibitory liquor laws were in force, this act of Congress was obviously intended to remove an obstruction which the channels of interstate trade presented to the various States in their attempt to suppress the lottery traffic. It is well known that all such attempts on the part of States have largely failed for the want of Congressional action with respect to interstate commerce. As long as lottery matter can be imported from other States, or from foreign countries, the local statutes of such States will be ineffective. So fully is this recognized that one Western State has recently considered the wisdom of repealing its prohibitory statutes with reference to lotteries and authorizing a lottery as a fiscal agency of the State, in imitation of France, Austria, and other European nations, and the chief argument for such legislation has been that as it has been impossible to prevent the people of the States from purchasing lottery tickets where the situs of the lottery is in a foreign country or in another State, it would be better for the State to have its own lottery, and thus guarantee the fairness of its administration. Indeed, the importance of these cases is that if

In re Rahrer, 140 U. S., 545.

this act be declared unconstitutional, and there be no power in Congress to suppress interstate commerce in lotteries, then the demoralization of these business enterprises can not be successfully combated. Is it possible that the Federal Government is so impotent that when it sees the channels of interstate commerce used as a means to strike down the police powers of the State that it can not assist the States in their laudable purpose of suppressing this demoralizing business?

X.

**2. The power to prohibit exists for any purpose referable to the legitimate objects of government, such as the preservation of health, the protection of morals, and the safety of life.**

It is not essential, however, for the Government to contend for an absolute power of prohibition, and it may well be that where a prohibition is not referable to some of the police powers of a sovereign State, or to the great aims for which all government is founded, and where therefore such prohibition is an undue trespass upon the liberties of the citizens, that the judicial department of the Government would have the power to declare such a law void. The bill of rights contained in the amendments to the Constitution may well prohibit many arbitrary and unwarranted prohibitions of trade between the States.

Any prohibition that would lead to a preference to any port, or that would destroy the immunities and privileges of citizenship, would present a very different question from that involved in the cases at bar. In

other words, there is as to interstate trade a Federal police power, and the ends that justify the State police power—the protection of life and property and the conservation of public morals—justify the other. This Federal police power is manifested in the legislation previously referred to (see p. 66), where the conveyance of obscene matter, the immigration of immoral aliens, the transportation of diseased cattle, etc., are instanced.

The ends for which the Federal Government was formed are further subserved when the Federal power aids the police powers of the State in the enforcement of internal regulations to the extent of preventing the channels of interstate trade from being an obstruction to the enforcement of police regulations. Thus the game laws, which forbid the transportation of game which has been killed within a State in defiance of its game laws, and the legislation reviewed *In re Rahrer*, which practically forbade the transportation of liquor to States where prohibitory laws existed, are instances where the Federal police power was invoked, not to strike down, but to aid the police powers of the State in the due enforcement of its laws.

Steam and electricity have woven the American people into a closeness of life of which the framers of the Constitution never dreamed, and the necessity for Federal police regulations as to any matter within the Federal sphere of power becomes increasingly apparent. The constitutionality of arbitrary prohibitions can be discussed when such a case arises, and as yet no such case has arisen, but a reasonable and proper

prohibition of immoral or unsafe trade through the channels of interstate commerce is a police power which belongs to the Republic as the sovereign authority over interstate trade. Such police power must exist somewhere as to interstate trade. It can not be nonexistent. Obviously it does not exist in the States; therefore it must exist in the Federal Government, and there is nothing in the legislative or judicial history of the country that in any manner gainsays this conclusion.

## XI.

**3. The power to regulate interstate commerce being an express power, with no express restrictions on the prohibition of interstate traffic in a given article, the purposes for which Congress may prohibit are not reviewable by the courts.**

An implied power can be exercised only for the purposes for which it is required, but an express power is unlimited and may be exercised whenever Congress in its discretion shall see fit. Thus in *McCulloch* v. *Maryland* (4 Wheat., 316, 421) Chief Justice Marshall said of the power to incorporate:

McCulloch v. Maryland, 4 Wheat., 316.

> Had it been intended to grant this power as one which should be distinct and independent, to be exercised in any case whatever, it would have found a place among the enumerated powers of the Government.

It may be argued that this prohibition of lottery traffic is in aid of the police power of the States, or even an attempt by Congress to supply deficiencies in

the exercise of police power by certain States; and that Congress is not vested with such police power. Were this so, nevertheless Congress, having an express and unlimited power to regulate interstate commerce, may do so without having its reasons questioned. (See *Doyle* v. *Continental Ins. Co.*, 94 U. S., 535, 541.) It is well settled that Congress has no power to regulate an agricultural or manufacturing industry within a State (*United States* v. *E. C. Knight Co.*, 156 U. S., 1, and cases cited); yet, as above shown, it has always claimed and exercised a right to use its commercial power for the purpose of directing the course of development of these industries. Congress has no power to regulate the descent of real property in the various States; yet it has always had, and frequently exercised, the power to make treaties for the purpose of altering these laws of descent on behalf of the subjects of favored European nations. (*Hauenstein* v. *Lynham*, 100 U. S., 483, and cases cited; *Geofroy* v. *Riggs*, 133 U. S., 258, 266–267.) The exclusion of obscene articles from foreign commerce and of spirituous liquors from commerce with the Indian tribes is for purposes precisely similar to those which inspire our anti-lottery legislation.

Doyle v. Ins. Co., 94 U. S., 535.

United States v. Knight, 156 U. S., 1.

Hauenstein v. Lynham, 100 U. S., 483.

Geofroy v. Riggs, 133 U. S., 258.

## XII.

### THE FREEDOM OF THE PRESS NOT ABRIDGED.

Two minor questions remain to be noted. In the brief filed by ex-Senator Edmunds it was suggested that the statute now under consideration was an

abridgment of the freedom of the press. On the last oral argument counsel for appellant abandoned this contention at bar. It hardly needs extended argument. The liberty of the press is the freedom to express and circulate printed *opinions*. It can not include lottery matter, for two reasons. In the first place, such freedom does not include the right to circulate that which, in the legislative discretion of a country, is immoral or indecent. It could not be contended that obscene literature has freedom of circulation because it is printed. If so, every statute punishing the printing, sale, or circulation of indecent literature is invalid. Congress has seen fit to place lottery matter upon the same ground as indecent literature or other fraudulent or immoral devices, and the freedom of the press is obviously subject to this fundamental limitation imposed by good morals. Moreover, the freedom of the press is the freedom to express printed opinions, and, while lottery advertisements might be within this definition, yet a lottery ticket is not an expression of an opinion in any sense of the word. It is purely a commercial instrument, and its prohibition in no way infringes upon the right to express opinion and circulate the same. All this seems so obvious that no further argument need be made. See *Ex parte Jackson* (96 U. S., 727, 736), *In re Rapier* (143 U. S., 110), and *Horner* v. *United States* (143 U. S., 207), where such police power is clearly upheld. In the Rapier case Chief Justice Fuller said:

> The States, before the Union was formed, could establish post-offices and post roads, and

in doing so could bring into play the police power in the protection of their citizens from the use of the means so provided for purposes supposed to exert a demoralizing influence upon the people. When the power to establish post-offices and post roads was surrendered to the Congress it was as a complete power, and the grant carried with it the right to exercise all the powers which made that power effective. It is not necessary that Congress should have the power to deal with crime or immorality within the States in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality.

## XIII.

### CONSTRUCTION OF ACT OF MARCH 2, 1895.

In the Francis case a minor question is suggested as to the true construction of the act of March 2, 1895. It is contended that the entire act only has reference to lottery matter that has been originally imported from a foreign country. As to this I might well rest the Government's case upon the clear and satisfactory reasoning of Circuit Judge Severens, who announced the judgment of the circuit court of appeals. (See page 362, Transcript of Record.)

I need add little to that which Judge Severens has said. If the language be in doubt, the legislative history of the act will, I think, convince the court that Congress intended to suppress domestic lotteries as well as foreign lotteries. The court is familiar with the fact that for some years the Federal Government has sought

to break up the lottery traffic. By Revised Statutes, 3894, 3929, and 4041, it excluded lottery matter from any branch of the mail service. This legislation having proved insufficient, the act of September 19, 1890, was passed, which, in a more sweeping and, as was thought, in a more effective way, sought to prohibit the use of the mails in connection with lottery enterprises. Recognizing that much of this lottery matter came from other countries, the act of August 28, 1894, prohibited the importation into this country of any lottery ticket or any advertisement of any lottery. All of these measures proved ineffective to wholly prohibit the lottery traffic. Excluded from the mails and from all importation, the lottery companies resorted to express companies and other carriers, and transported their tickets in that way. Foreign lotteries, to evade the nonimportation act, constituted agencies in this country, and had the necessary tickets and other matter printed in this country and transported in the manner indicated. Congress therefore deemed it necessary, if the traffic was to be suppressed, to prohibit the carriage, by any method, of lottery matter. This gave rise to the act of March 2, 1895. It is unnatural to assume that Congress intended to limit the act of March 2, 1895, to lottery matter which had been first imported. Had this been the case the act would have been largely ineffective and fallen short of its obvious purpose, for tickets and other matter would have been printed in this country, as Mr. Guthrie has already

pointed out in his brief in the Champion case. In my original brief in the Champion case, pages 7 to 11, inclusive, I have given the history of the legislation, and a reference to the debates will show that the entire lottery traffic, foreign or domestic, was evidently in the contemplation of Congress.

The title of the act clearly indicates the purpose to reach the entire traffic, domestic or foreign, and the reasonable and grammatical construction of the act would indicate the same thought. The matter whose carriage is forbidden is "a ticket, chance, share, or interest in, or dependent upon the event of a lottery." Any lottery, whether foreign or domestic, is therefore within the general language of the act. Had Congress referred only to foreign lotteries it would presumably have qualified the language in some way. Its purpose obviously was (1) to prevent the importation of lottery matter; (2) to prevent the carriage by mail of lottery matter; (3) to prevent the carriage from one State to another in the United States of lottery matter; and the situs of the lottery enterprise was wholly unimportant.

The record of the Francis case also presents many questions affecting the form of the indictment, the introduction of evidence, and the charge of the court. A careful examination of them discloses that none has any merit, and to discuss them would be to extend an already lengthy brief far beyond the patience of the court. I am content to rest the Government's case, in this respect, upon the record and the decision of the court below, which, after full consideration, found no

error in the many assignments of error which the industry of counsel has succeeded in multiplying.

Respectfully submitted.

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# Supreme Court of the United States.

No. 2.—October Term, 1902.

Charles F. Champion, Appellant, vs. John C. Ames, United States Marshal. } Appeal from the Circuit Court of the United States for the Northern District of Illinois.

[February 23d 1903.]

Mr. Justice Harlan delived the opinion of the Court.

The general question arising upon this appeal involves the constitutionality of the first section of the act of Congress of March 2d 1895, c. 191, entitled "An act for the suppression of lottery traffic through national and interstate commerce and the postal service, subject to the jurisdiction and laws of the United States." 28 *Stat.* 963.

The appeal was from an order of the Circuit Court of the United States for the Northern District of Illlnois dismissing a writ of *habeas corpus* sued out by the appellant Champion, who in his application complained that he was restrained of his liberty by the Marshal of the United States in violation of the Constitution and laws of the United States.

It appears that the accused was under indictment in the District Court of the United States for the Northern District of Texas for a conspiracy under section 5440 of the Revised Statutes, providing that "if two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than two years."

He was arrested at Chicago under a warrant based upon a complaint in writing, under oath, charging him with conspiring with others, at Dallas, in the Northern District of Texas, to commit the offense denounced in the above act of 1895; and the object of the arrest was to compel his appearance in the Federal court in Texas to answer the indictment against him.

The first section of the act of 1895, upon which the indictment was based, is as follows: "§ 1. That any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, or deposited in or carried by the mails of the United States, or carried from one State to another in the United States, any paper, certificate or instrument purporting to be or represent a ticket, chance, share or interest

in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert or similar enterprises, offering prizes dependent upon lot or chance, to be brought into the United States, or deposited in or carried by the mails of the United States, or transferred from one State to another in the same, shall be punishable in [for] the first offense by imprisonment for not more than two years or by a fine of not more than one thousand dollars, or both, and in the second and after offenses by such imprisonment only." 28 *Stat.* 963.

The indictment charged, in its first count, that on or about the first day of February A. D. 1899, in Dallas County, Texas, "C. F. Champion, alias W. W. Ogden, W. F. Champion and Charles B. Park did then and there unlawfully, knowingly and feloniously conspire together to commit an offense against the United States, to wit, for the purpose of disposing of the same, to cause to be carried from one State to another in the United States, to wit, from Dallas, in the State of Texas, to Fresno, in the State of California, certain papers, certificates and instruments purporting to be and representing tickets, as they then and there well knew, chances, shares and interests in and dependent upon the event of a lottery, offering prizes dependent upon lot and chance, that is to say, caused to be carried, as aforesaid, for the purpose of disposing of the same, papers, certificates or instruments purporting to be tickets to represent the chances, shares and interests in the prizes which by lot and chance might be awarded to persons, to these grand jurors unknown, who might purchase said papers, certificates and instruments representing and purporting to be tickets, as aforesaid, with the numbers thereon shown and indicated and printed, which by lot and chance should, on a certain day, draw a prize or prizes at the purported lottery or chance company, to wit, at the purported monthly drawing of the so-called Pan-American Lottery Company, which purported to draw monthly at Ascuncion, Paraguay, which said Pan-American Lottery Company purported to be an enterprise offering prizes dependent upon lot and chance, the specific method of such drawing being unknown to the grand jurors, but which said papers, certificates and instruments purporting to be and representing tickets upon their face purporting to be entitled to participation in the drawing for a certain capital prize amounting to the sum of thirty-two thousand dollars, and which said drawings for said capital prize, or the part or parts thereof allotted or to be allotted in conformity with the scheme of lot and chance, were to take place monthly, the manner and form of which is to the grand jurors unknown, but that said drawing and lot and chance by which said prize or prizes were to be drawn was purported to be under the supervision and direction of Enrigue Montes de Leon, manager, and Bernardo Lopez, intervenor, and which said papers, certificates and instruments pur-

porting to be tickets of the said Pan-American Lottery Company were so divided as to be called whole, half, quarter and eighth tickets, the whole tickets to be sold for the sum of two dollars, the half tickets for the sum of one dollar, the quarter tickets for the sum of fifty cents and the eighth tickets for the sum of twenty-five cents."

The indictment further charged that "in pursuance to said conspiracy, and to effect the object thereof, to wit, for the purpose of causing to be carried from one State to another in the United States, to wit, from the State of Texas to the State of California aforesaid, for the purpose of disposing of the same, papers, certificates and instruments purporting to be and representing tickets, chances and shares and interests in and dependent upon lot and chance, as aforesaid, as they then and there well knew, said W. F. Champion and Charles B. Park did then and there, to wit, on or about the day last aforesaid, in the year 1899, in the county aforesaid, in the Dallas division of the Northern District of Texas aforesaid, unlawfully, knowingly and feloniously, for the purpose of being carried from one State to another in the United States, to wit, from Dallas, in the State of Texas, to Fresno, in the State of California, for the purpose of disposing of the same, deposit and cause to be deposited and shipped and carried with and by the Wells-Fargo Express Company, a corporation engaged in carrying freight and packages from station to station along and over lines of railway, and from Dallas, Texas, to Fresno, California, for hire, one certain box or package containing, among other things, two whole tickets or papers or certificates of said purported Pan-American Lottery Company, one of which said whole tickets is hereto annexed by the grand jury to this indictment and made a part hereof."

It thus appears that the carrying in this case was by an incorporated express company, engaged in transporting freight and packages from one State to another.

The Commissioner who issued the warrant of arrest, having found that there was probable cause to believe that Champion was guilty of the offense charged, ordered that he give bond for his appearance for trial in the District Court of the United States for the Northern District of Texas, or in default thereof to be committed to jail. Having declined to give the required bond the accused was taken into custody. *R. S.* § 1014. Thereupon he sued out the present writ of *habeas corpus* upon the theory that the act of 1895, under which it was proposed to try him was void, under the Constitution of the United States.

The appellant insists that the carrying of lottery tickets from one State to another State by an express company engaged in carrying freight and packages from State to State, although such tickets may be contained in a box or package, does not constitute, and cannot by any act of Congress be legally made to constitute, *commerce* among the States within

the meaning of the clause of the Constitution of the United States providing that Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes;" consequently, that Congress cannot make it an offense to cause such tickets to be carried from one State to another.

The Government insists that express companies when engaged, for hire, in the business of transportation from one State to another, are instrumentalities of commerce among the States; that the carrying of lottery tickets from one State to another is commerce which Congress may regulate; and that as a means of executing the power to regulate interstate commerce Congress may make it an offense against the United States to cause lottery tickets to be carried from one State to another.

The questions presented by these opposing contentions are of great moment, and are entitled to receive, as they have received, the most careful consideration.

What is the import of the word "commerce" as used in the Constitution? It is not defined by that instrument. Undoubtedly, the carrying from one State to another by independent carriers of things or commodities that are ordinary subjects of traffic, and which have in themselves a recognized value in money, constitutes interstate commerce. But does not commerce among the several States include something more? Does not the carrying from one State to another, by independent carriers, of lottery tickets that entitle the holder to the payment of a certain amount of money therein specified also constitute commerce among the States?

It is contended by the parties that these questions are answered in the former decisions of this court, the Government insisting that the principles heretofore announced support its position, while the contrary is confidently asserted by the appellant. This makes it necessary to ascertain the import of such decisions. Upon that inquiry we now enter, premising that some propositions were advanced in argument that need not be considered. In the examination of former judgments it will be best to look at them somewhat in the order in which they were rendered. When prior adjudications have been thus collated the particular grounds upon which the judgment in the present case must necessarily rest can be readily determined. We may here remark that some of the cases referred to may not bear directly upon the questions necessary to be decided, but attention will be directed to them as throwing light upon the general inquiry as to the meaning and scope of the commerce clause of the Constitution.

The leading case under the commerce clause of the Constitution is *Gibbons* v. *Ogden*, 9 *Wheat.* 1, 189, 194. Referring to that clause, Chief Justice Marshall said: "The subject to be regulated is commerce; and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to

settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. . . It has been truly said that commerce, as the word is used in the Constitution, is a unit, every part of which is indicated by the term. If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it. The subject to which the power is next applied is to commerce 'among the several States.' The word 'among' means intermingled with. A thing which is among others is intermingled with them. Commerce among the States cannot stop at the external boundary line of each State, but may be introduced into the interior. It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient and is certainly unnecessary. Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. . . The genius and character of the whole Government seem to be that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. . ."

Again: "We are now arrived at the inquiry—what is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is *complete in itself*, may be exercised *to its utmost extent*, and acknowledges *no limitations, other than are prescribed in the Constitution.* These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specific objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress *as absolutely as it would be in a single Government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States.*"

Mr. Justice Johnson, in the same case, expressed his entire approbation of the judgment rendered by the court, but delivered a separate opinion

indicating the precise grounds upon which his conclusion rested. Referring to the grant of power over commerce, he said: "My opinion is founded on the application of the words of the grant to the subject of it. The 'power to regulate commerce' here meant to be granted was that power to regulate commerce which previously existed in the States. But what was that power? The States were, unquestionably, supreme; and each possessed that power over commerce which is acknowledged to reside in every sovereign State. . . The law of nations, regarding man as a social animal, pronounces all commerce legitimate in a state of peace, until prohibited by positive law. The power of a sovereign State over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure. And, since the power to prescribe the limits to its freedom necessarily implies the power to determine what shall remain unrestrained, it follows that the power must be exclusive; it can reside but in one potentate; and hence the grant of this power carries with it the whole subject, leaving nothing for the State to act upon."

The principles announced in *Gibbons* v. *Ogden* were reaffirmed in *Brown* v. *Maryland*, 12 *Wheat.* 419, 446. After expressing doubt whether any of the evils proceeding from the feebleness of the Federal Government contributed more to the establishing of the present constitutional system than the deep and general conviction that commerce ought to be regulated by Congress, Chief Justice Marshall, speaking for the court, said: "It is not, therefore, matter of surprise that the grant should be as extensive as the mischief and should comprehend all foreign commerce, and all commerce among the States." Considering the question as to the just extent of the power to regulate commerce with foreign nations and among the several States, the court reaffirmed the doctrine that the power was "complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution. . . Commerce is intercourse; one of its most ordinary ingredients is traffic."

In the *Passenger Cases*, 7 *How.* 283, the court adjudged certain statutes of New York and Massachusetts, imposing taxes upon alien passengers arriving in the ports of those States, to be in violation of the Constitution and laws of the United States. In the separate opinions delivered by the Justices there will not be found any expression of doubt as to the doctrines announced in *Gibbons* v. *Ogden*. Mr. Justice McLean said: "Commerce is defined to be 'an exchange of commodities.' But this definition does not convey the full meaning of the term. It includes 'navigation and intercourse.' That the transportation of passengers is part of commerce is not now an open question." Mr. Justice Grier said: "Commerce, as defined by this court, means something more than traffic—it is intercourse; and the power committed to Congress to regulate commerce is exercised by prescribing rules for carrying on that intercourse." The

same views were expressed by Mr. Justice Wayne, in his separate opinion. He regarded the question then before the court as covered by the decision in *Gibbons* v. *Ogden*, and in respect to that case he said: "It will always be a high and honorable proof of the eminence of the American bar of that day, and of the talents and distinguished ability of the Judges who were then in the places which we now occupy." Mr. Justice Catron and Mr. Justice McKinley announced substantially the same views.

In *Almy* v. *State of California*, 24 *How.* 169, a statute of California imposing a stamp duty upon bills of lading for gold or silver transported from that State to any port or place out of the State was held to be a tax on exports, in violation of the provision of the Constitution declaring that "no tax or duty shall be laid on articles exported from any State." But in *Woodruff* v. *Parham*, 8 *Wall.* 123, 138, this court, referring to the Almy case, said it was well decided upon a ground not mentioned in the opinion of the court, namely, that, although the tax there in question was only on bills of lading, "such a tax was a regulation of commerce, a tax imposed upon the transportation of goods from one State to another, over the high seas, in conflict with that freedom of transit of goods and persons between one State and another, which is within the rule laid down in *Crandall* v. *Nevada*, and with the authority of Congress to regulate commerce among the States."

In *Henderson &c.* v. *Mayor &c.*, 92 *U. S.* 259, 270, which involved the constitutional validity of a statute of New York relating to vessels bringing passengers to that port, this court, speaking by Mr. Justice Miller, said: "As already indicated, the provisions of the Constitution of the United States, on which the principal reliance is placed to make void the statute of New York, is that which gives to Congress the power 'to regulate commerce with foreign nations.' As was said in *United States* v. *Halliday*, 3 *Wall.* 417, 'commerce with foreign nations means commerce between citizens of the United States and citizens or subjects of foreign governments.' It means trade, and it means intercourse. It means commercial intercourse between nations, and parts of nations, in all its branches. It includes navigation, as the principal means by which foreign intercourse is effected. To regulate this trade and intercourse is to prescribe the rules by which it shall be conducted. 'The mind,' says the great Chief Justice, 'can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of one nation into the ports of another;' and he might have added, with equal force, which prescribed no terms for the admission of their cargo or their passengers. *Gibbons* v. *Ogden*, 9 *Wheat.* 190."

The question of the scope of the commerce clause was again considered in *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 *U. S.* 1, 9, 12, involving the validity of a statute of Florida, which assumed to confer upon a

local telegraph company the exclusive right to establish and maintain lines of electric telegraph in certain counties of Florida. This court held the act to be unconstitutional. Chief Justice Waite, delivering its judgment, said: "Since the case of *Gibbons* v. *Ogden*, 9 *Wheat.* 1, it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. Post offices and post roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the national government. The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were entrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation. The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business, and become one of the necessities of commerce. It is indispensable as a means of intercommunication, but especially is it so in commercial transactions." In his dissenting opinion in that case Mr. Justice Field speaks of the importance of the telegraph "as a means of intercourse," and of its constant use in commercial transactions.

In *County of Mobile* v. *Kimball*, 102 *U. S.* 691, Mr. Justice Field, delivering the judgment of the court, said: "Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in those terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities." This principle was expressly reaffirmed in *Gloucester Ferry Company* v. *Pennsylvania*, 114 *U. S.* 196, 203.

Applying the doctrine announced in *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, it was held in *Telegraph Co.* v. *Texas*, 105 *U. S.* 460, that the law of a State imposing a tax on private telegraph messages sent out of the State was unconstitutional, as being, in effect, a regulation of interstate commerce.

In *Brown* v. *Houston*, 114 *U. S.* 630, it was declared by the court, speaking by Mr. Justice Bradley, that "the power to regulate commerce among

the several States is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations." The same thought was expressed in *Bowman* v. *Chicago &c. Railway Co.*, 125 *U. S.* 482; *Crutcher* v. *Kentucky*, 141 *U. S.* 47, 58, and *Pittsburg Coal Co.* v. *Bates*, 156 *U. S.* 587.

In *Pickard* v. *Pullman Southern Car Company*, 117 *U. S.* 34, it was said to be settled by the adjudged cases that to tax "the transit of passengers from foreign countries or between the States is to regulate commerce."

In *Western Union Tel. Co.* v. *Pendleton*, 122 *U. S.* 347, 356, the court recognized the commerce with foreign countries and among the States which Congress could regulate as including not only the exchange and transportation of commodities, or visible, tangible things, but the carriage of persons, and the transmission by telegraph of ideas, wishes, orders and intelligence. See also *Ratterman* v. *Tel. Co.*, 127 *U. S.* 411, and *Leloup* v. *Port of Mobile*, 127 *U. S.* 640.

In *Covington &c. Bridge Company* v. *Kentucky*, 154 *U. S.* 204, 218, the question was as to the validity, under the commerce clause of the Constitution, of an act of the Kentucky Legislature relating to tolls to be charged or received for passing over the bridge of the Covington and Cincinnati Bridge Company, a corporation of both Kentucky and Ohio, erected between Covington and Cincinnati. A State enactment prescribing a rate of toll on the bridge was held to be unconstitutional, as an unauthorized regulation of interstate commerce. The court, reaffirming the principles announced in *Gloucester Ferry Company* v. *Pennsylvania*, 114 *U. S.* 196, and in *Wabash &c. Railway Company* v. *Illinois*, 118 *U. S.* 557, said, among other things: "Commerce was defined in *Gibbons* v. *Ogden*, 9 *Wheat.* 1, 189, to be 'intercourse,' and the thousands of people who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool. While the bridge company is not itself a common carrier, it affords a highway for such carriage, and a toll upon such bridge is as much a tax upon commerce as a toll upon a turnpike is a tax upon the traffic of such turnpike, or the charges upon a ferry a tax upon the commerce across a river."

At the present term of the court we said that "transportation for others, as an independent business, is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered." *Hanley &c.* v. *Kansas City Southern Railway*, 187 *U. S.*

This reference to prior adjudications could be extended if it were necessary to do so. The cases cited however sufficiently indicate the grounds upon which this court has proceeded when determining the meaning and scope of the commerce clause. They show that commerce among the States embraces navigation, intercourse, communication, traffic, the transit

of persons, and the transmission of messages by telegraph. They also show that the power to regulate commerce among the several States is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States; that such power is plenary, complete in itself, and may be exerted by Congress to its utmost extent, subject *only* to such limitations as the Constitution imposes upon the exercise of the powers granted by it; and that in determining the character of the regulations to be adopted Congress has a large discretion which is not to be controlled by the courts, simply because, in their opinion, such regulations may not be the best or most effective that could be employed.

We come then to inquire whether there is any solid foundation upon which to rest the contention that Congress may not regulate the carrying of lottery tickets from one State to another, at least by corporations or companies whose business it is, for hire, to carry tangible property from one State to another.

It was said in argument that lottery tickets are not of any real or substantial value in themselves, and therefore are not subjects of commerce. If that were conceded to be the only legal test as to what are to be deemed subjects of the commerce that may be regulated by Congress, we cannot accept as accurate the broad statement that such tickets are of no value. Upon their face they showed that the lottery company offered a large capital prize, to be paid to the holder of the ticket winning the prize at the drawing advertised to be held at Ascencion, Paraguay. Money was placed on deposit in different banks in the United States to be applied by the agents representing the lottery company to the prompt payment of prizes. These tickets were the subject of traffic; they could have been sold; and the holder was assured that the company would pay to him the amount of the prize drawn. That the holder might not have been able to enforce his claim in the courts of any country making the drawing of lotteries illegal, and forbidding the circulation of lottery tickets, did not change the fact that the tickets issued by the foreign company represented so much money payable to the person holding them and who might draw the prizes affixed to them. Even if a holder did not draw a prize, the tickets, before the drawing, had a money value in the market among those who chose to sell or buy lottery tickets. In short, a lottery ticket is a subject of traffic, and is so designated in the act of 1895. 28 *Stat.* 963. That fact is not without significance in view of what this court has said. That act, counsel for the accused well remarks, "was intended to supplement the provisions of prior acts, excluding lottery tickets from the mails, and [redacted] prohibiting the importation of lottery matter from abroad, and to prohibit the act of causing lottery tickets to be carried, and lottery and lottery advertisements to be

tickets

transferred from one State to another by any means or method." 15 *Stat.* 196; 17 *Stat.* 302; 19 *Stat.* 90; *R. S.* § 3894; 26 *Stat.* 465; 28 *Stat.* 963.

We are of opinion that lottery tickets are subjects of traffic and therefore are subjects of commerce, and the regulation of the carriage of such tickets from State to State, at least by independent carriers, is a regulation of commerce among the several States.

But it is said that the statute in question does not regulate the carrying of lottery tickets from State to State, but by punishing those who cause them to be so carried Congress in effect prohibits such carrying; that in respect of the carrying from one State to another of articles or things that are, in fact, or according to usage in business, the subjects of commerce, the authority given Congress was not to *prohibit*, but only to *regulate*. This view was earnestly pressed at the bar by learned counsel, and must be examined.

It is to be remarked that the Constitution does not define what is to be deemed a legitimate regulation of interstate commerce. In *Gibbons* v. *Ogden* it was said that the power to regulate such commerce is the power to prescribe the rule by which it is to be governed. But this general observation leaves it to be determined, when the question comes before the court, whether Congress in prescribing a particular rule has exceeded its power under the Constitution. While our Government must be acknowledged by all to be one of enumerated powers, *McCullough* v. *Maryland*, 4 *Wheat.* 316, 405, 407, the Constitution does not attempt to set forth all the means by which such powers may be carried into execution. It leaves to Congress a large discretion as to the means that may be employed in executing a given power. The sound construction of the Constitution, this court has said, "must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." *Ib.* 421.

We have said that the carrying from State to State of lottery tickets constitutes interstate commerce, and that the regulation of such commerce is within the power of Congress under the Constitution. Are we prepared to say that a provision which is, in effect, a *prohibition* of the carriage of such articles from State to State is not a fit or appropriate mode for the *regulation* of that particular kind of commerce? If lottery traffic, *carried on through interstate commerce*, is a matter of which Congress may take cognizance and over which its power may be exerted, can it be pos-

sible that it must tolerate the traffic, and simply regulate the manner in which it may be carried on? Or may not Congress, for the protection of the people of all the States, and under the power to regulate interstate commerce, devise such means, within the scope of the Constitution, and not prohibited by it, as will drive that traffic out of commerce among the States?

In determining whether regulation may not under some circumstances properly take the form or have the effect of prohibition, the nature of the interstate traffic which it was sought by the act of May 2d 1895 to suppress cannot be overlooked. When enacting that statute Congress no doubt shared the views upon the subject of lotteries heretofore expressed by this court. In *Phalen* v. *Virginia*, 8 *How.* 163, 168, after observing that the suppression of nuisances injurious to public health or morality is among the most important duties of Government, this court said: "Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple." In other cases we have adjudged that authority given by legislative enactment to carry on a lottery, although based upon a consideration in money, was not protected by the contract clause of the Constitution; this, for the reason that no State may bargain away its power to protect the public morals, nor excuse its failure to perform a public duty by saying that it had agreed, by legislative enactment, not to do so. *Stone* v. *Mississippi*, 101 *U. S.* 814; *Douglas* v. *Kentucky*, 168 *U. S.* 488.

If a State, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another? In this connection it must not be forgotten that the power of Congress to regulate commerce among the States is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution. What provision in that instrument can be regarded as limiting the exercise of the power granted? What clause can be cited which, in any degree, countenances the suggestion that one may, of right, carry or cause to be carried from one State to another that which will harm the public morals? We cannot think of any clause of that instrument that could possibly be invoked by those who assert their right to send lottery tickets from State to State ex-

cept the one providing that no person shall be deprived of his liberty without due process of law. We have said that the liberty protected by the Constitution embraces the right to be free in the enjoyment of one's faculties; "to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts that may be proper." *Allgeyer* v. *Louisiana*, 165 *U. S.* 578, 589. But surely it will not be said to be a part of any one's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the States an element that will be confessedly injurious to the public morals.

If it be said that the act of 1895 is inconsistent with the Tenth Amendment, reserving to the States respectively or to the people the powers not delegated to the United States, the answer is that the power to regulate commerce among the States has been expressly delegated to Congress.

Besides, Congress, by that act, does not assume to interfere with traffic or commerce in lottery tickets carried on exclusively within the limits of any State, but has in view only commerce of that kind among the several States. It has not assumed to interfere with the completely internal affairs of any State, and has only legislated in respect of a matter which concerns the people of the United States. As a State may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the "widespread pestilence of lotteries" and to protect the commerce which concerns all the States, may prohibit the carrying of lottery tickets from one State to another. In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those States—perhaps all of them—which, for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. We say competent to that end, because Congress alone has the power to occupy, by legislation, the whole field of interstate commerce. What was said by this court upon a former occasion may well be here repeated: "The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject matter specifically committed to its charge." *In re Rahrer*, 140 *U. S.* 545, 563. If the

carrying of lottery tickets from one State to another be interstate commerce and if Congress is of opinion that an effective regulation for the suppression of lotteries, carried on through such commerce, is to make it a criminal offense to cause lottery tickets to be carried from one State to another, we know of no authority in the courts to hold that the means thus devised are not appropriate and necessary to protect the country at large against a species of interstate commerce which, although in general use and somewhat favored in both national and State legislation in the early history of the country, has grown into disrepute and has become offensive to the entire people of the Nation. It is a kind of traffic which no one can be entitled to pursue as of right.

That regulation may sometimes appropriately assume the form of prohibition is also illustrated by the case of diseased cattle, transported from one State to another. Such cattle may have, notwithstanding their condition, a value in money for some purposes, and yet it cannot be doubted that Congress, under its power to regulate commerce, may either provide for their being inspected before transportation begins, or, in its discretion, may prohibit their being transported from one State to another. Indeed, by the act of May 29th 1884, c. 60, Congress has provided: "That no railroad company within the United States, or the owners or masters of any steam or sailing vessel, or other vessel or boat, shall receive for transportation or transport, from one State or Territory to another, or from any State into the District of Columbia, or from the District into any State, any live stock affected with any contagious, infectious or communicable disease, and especially the disease known as pleuro-pneumonia; nor shall any person, company or corporation deliver for such transportation to any railroad company or master or owner of any boat or vessel, any live stock, knowing them to be affected with any contagious, infectious or communicable disease. Nor shall any person, company or corporation drive on foot or transport in private conveyance from one State or Territory to another, or from any State into the District of Columbia, or from the District into any State, any live stock, knowing them to be affected with any contagious, infectious or communicable disease, and especially the disease known as pleuro-pneumonia." *Reid* v. *State of Colorado, present term.*

The act of July 2d 1890, known as the Sherman Anti-Trust act, and which is based upon the power of Congress to regulate commerce among the States, is an illustration of the proposition that regulation may take the form of prohibition. The object of that act was to protect trade and commerce against unlawful restraints and monopolies. To accomplish that object Congress declared certain contracts to be illegal. That act, in effect, prohibited the doing of certain things, and its prohibitory clauses have been sustained in several cases as valid under the power of Congress to egulate interstate commerce. *United States* v. *Trans-Mission Freight Asso-*

*ciation*, 166 *U. S.* 290; *United States* v. *Joint Traffic Association*, 171 *U. S.* 505; *Addison Pipe & Steel Company* v. *United States*, 175 *U. S.* 211. In the case last named the court, referring to the power of Congress toregulate commerce among the States, said: "In *Gibbons* v. *Ogden*, *supra*, the power was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution. Under this grant of power to Congress that body, in our judgment, may enact such legislation as shall declare void and *prohibit* the performance of any contract between individuals and corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce. (And when we speak of interstate we also include in our meaning foreign commerce.) We do not assent to the correctness of the proposition that the constitutional guaranty of liberty to the individual to enter into private contracts limits the power of Congress and prevents it from legislating upon the subject of contracts of the class mentioned. The power to regulate interstate commerce is, as stated by Chief Justice Marshall, full and complete in Congress, and there is no limitation in the grant of the power which excludes private contracts of the nature in question from the jurisdiction of that body. Nor is any such limitation contained in that other clause of the Constitution, which provides that no person shall be deprived of life, liberty or property without due process of law." Again: "The provision in the Constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above nature while in the exercise of its constitutional right to regulate commerce among the States. On the contrary, we think the provision regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the Constitution, and that the power of Congress to regulate interstate commerce comprises the right to enact a law *prohibiting* the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally and collaterally, regulate to a greater or less degree commerce among the States."

That regulation may sometimes take the form or have the effect of prohibition is also illustrated in the case of *In re Rahrer*, 140 *U. S.* 545. In *Mugler* v. *Kansas*, 123 *U. S.* 623, it was adjudged that State legislation prohibiting the manufacture of spirituous, malt, vinous, fermented or other intoxicating liquors within the limits of the State, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege or immunity secured by the Constitution of the United States or by the amendments thereto. Subsequently in *Bowman* v. *Chicago &c. Railway Co.*, 125 *U. S.* 465, this court held that ardent spirits, distilled liquors, ale and beer were subjects of exchange, barter and traffic, and were so recognized by the usages of the commercial world, as well as by the laws of Congress

and the decisions of the courts. In *Leisy* v. *Hardin*, 135 *U. S.* 100, the court again held that spirituous liquors were recognized articles of commerce, and declared a statute of Iowa prohibiting the sale within its limits of any intoxicating liquors, except for pharmaceutical, medicinal, chemical or sacramental purposes, under a State license, to be repugnant to the commerce clause of the Constitution, if applied to the sale, within the State, by the importer, in the original, unbroken packages, of such liquors manufactured in and brought from another State. And in determining ~~that case the court said that~~ whether a State could prohibit the sale within its limits, in original, unbroken packages, of ardent spirits, distilled liquors, ale and beer, imported from another State, this court said that they were recognized by the laws of Congress as well as by the commercial world "as subjects of exchange, barter and traffic," and that "whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognized as subjects of commerce are not such." *Leisy* v. *Hardin*, 135 *U. S.* 100, 110, 125.

Then followed the passage by Congress of the act of August 8th 1890, 26 *Stat.* 313, *c.* 728, providing "that all fermented, distilled or other intoxicating liquors or liquids transported into any State or Territory, or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." That act was sustained in the *Rahrer case* as a valid exercise of the power of Congress to regulate commerce among the States.

In *Rhodes* v. *Iowa*, 170 *U. S.* 412, 426, that statute—all of its provisions being regarded—was held as not causing the power of the State to attach to an interstate commerce shipment of intoxicating liquors "whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination and delivery there to the consignee."

Thus under its power to regulate interstate commerce, as involved in the transportation, in original packages, of ardent spirits from one State to another, Congress, by the necessary effect of the act of 1890 made it impossible to transport such packages to places within a prohibitory State and there dispose of their contents by sale; although it had been previously held that ardent spirits were recognized articles of commerce and, until Congress otherwise provided, could be imported into a State, and sold in the original packages, despite the will of the State. If at the time of the passage of the act of 1890 all the States had enacted liquor laws prohibiting the sale of intoxicating liquors within their respective

limits, then the act would have had the necessary effect to exclude ardent spirits altogether from commerce among the States; for no one would ship, for purposes of sale, packages containing such spirits to points within any State that forbade their sale at any time or place, even in unbroken packages, and, in addition, provided for the seizure and forfeiture of such packages. So that we have in the *Rahrer case* a recognition of the principle that the power of Congress to regulate interstate commerce may sometimes be exerted with the effect of excluding particular articles from such commerce.

It is said, however, that the principle that in order to suppress lotteries carried on through interstate commerce, Congress may exclude lottery tickets from such commerce, leads necessarily to the conclusion that Congress may arbitrarily exclude from commerce among the States any article, commodity or thing, of whatever kind or nature, or however useful or valuable, which it may choose, no matter with what motive, to declare shall not be carried from one State to another. It will be time enough to consider the constitutionality of such legislation when we must do so. The present case does not require the court to declare the full extent of the power that Congress may exercise in the regulation of commerce among the States. We may, however, repeat, in this connection, what the court has heretofore said, that the power of Congress to regulate commerce among the States, although plenary, cannot be deemed arbitrary, since it is subject to such limitations or restrictions as are prescribed by the Constitution. This power, therefore, may not be exercised so as to infringe rights secured or protected by that instrument. It would not be difficult to imagine legislation that would be justly liable to such an objection as that stated, and be hostile to the objects for the accomplishment of which Congress was invested with the general power to regulate commerce among the several States. But, as often said, the possible abuse of a power is not an argument against its existence. There is probably no governmental power that may not be exerted to the injury of the public. If what is done by Congress is manifestly in excess of the powers granted to it, then upon the courts will rest the duty of adjudging that its action is neither legal nor binding upon the people. But if what Congress does is within the limits of its power, and is simply unwise or injurious, the remedy is that suggested by Chief Justice Marshall in *Gibbons* v. *Ogden*, when he said: "The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative Governments."

The whole subject is too important, and the questions suggested by its consideration are too difficult of solution, to justify any attempt to lay down

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a rule for determining in advance the validity of every statute that may be enacted under the commerce clause. We decide nothing more in the present case than that lottery tickets are subjects of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one State to another is therefore interstate commerce; that under its power to regulate commerce among the several States Congress—subject to the limitations imposed by the Constitution upon the exercise of the powers granted—has plenary authority over such commerce, and may prohibit the carriage of such tickets from State to State; and that legislation to that end, and of that character, is not inconsistent with any limitation or restriction imposed upon the exercise of the powers granted to Congress.

The judgment is *Affirmed.*

True copy.

Test:

*Clerk Supreme Court, U. S.*

# Supreme Court of the United States.

No. 2.—October Term, 1902.

Charles F. Champion, Appellant, vs. John C. Ames, United States Marshal. } Appeal from the Circuit Court of the United States for the Northern District of Illinois.

[February 23, 1903.]

Mr. Chief Justice Fuller, with whom concur Mr. Justice Brewer, Mr. Justice Shiras, and Mr. Justice Peckham, dissenting:

Although the first section of the act of March 2, 1895, (28 Stat. 963, c. 191,) is inartificially drawn, I accept the contention of the government that it makes it an offense (1) to bring lottery matter from abroad into the United States; (2) to cause such matter to be deposited in or carried by the mails of the United States; (3) to cause such matter to be carried from one State to another in the United States; and further, to cause any advertisement of a lottery or similar enterprise to be brought into the United States, or be deposited or carried by the mails, or transferred from one State to another.

The case before us does not involve in fact the circulation of advertisements and the question of the abridgment of the freedom of the press; nor does it involve the importation of lottery matter, or its transmission by the mails. It is conceded that the lottery tickets in question, though purporting to be issued by a lottery company of Paraguay, were printed in the United States, and were not imported into the United States from any foreign country.

The naked question is whether the prohibition by Congress of the carriage of lottery tickets from one State to another by means other than the mails is within the powers vested in that body by the Constitution of the United States. That the purpose of Congress in this enactment was the suppression of lotteries cannot reasonably be denied. That purpose is avowed in the title of the act, and is its natural and reasonable effect, and by that its validity must be tested. *Henderson* v. *Mayor &c.*, 92 U. S. 268; *Minnesota* v. *Barber*, 136 U. S. 320.

The power of the State to impose restraints and burdens on persons and property in conservation and promotion of the public health, good order and prosperity is a power originally and always belonging to the States, not surrendered by them to the General Government nor directly restrained by the Constitution of the United States, and essentially exclu-

sive, and the suppression of lotteries as a harmful business falls within this power, commonly called of police. *Douglas* v. *Kentucky*, 168 U.S. 488.

It is urged, however, that because Congress is empowered to regulate commerce between the several States, it, therefore, may suppress lotteries by prohibiting the carriage of lottery matter. Congress may indeed make all laws necessary and proper for carrying the powers granted to it into execution, and doubtless an act prohibiting the carriage of lottery matter would be necessary and proper to the execution of a power to suppress lotteries; but that power belongs to the States and not to Congress. To hold that Congress has general police power would be to hold that it may accomplish objects not entrusted to the General Government, and to defeat the operation of the Tenth Amendment, declaring that: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The ground on which prior acts forbidding the transmission of lottery matter by the mails was sustained, was that the power vested in Congress to establish post offices and post roads embraced the regulation of the entire postal system of the country, and that under that power Congress might designate what might be carried in the mails and what excluded. *In re Rapier*, 143 U. S. 110; *Ex parte Jackson*, 96 U. S. 727.

In the latter case, Mr. Justice Field, delivering the unanimous opinion of the court, said: "But we do not think that Congress possesses the power to prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails. To give efficiency to its regulations and prevent rival postal systems, it may perhaps prohibit the carriage by others for hire, over postal routes, of articles which legitimately constitute mail matter, in the sense in which those terms were used when the Constitution was adopted, consisting of letters, and of newspapers and pamphlets, when not sent as merchandise; but further than this its power of prohibition cannot extend." And this was repeated in the case of Rapier.

Certainly the act before us cannot stand the test of the rule laid down by Mr. Justice Miller in the *Trade-Mark Cases*, 100 U.S. 96, when he said: "When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several States, or with the Indian tribes. If not so limited, it is in excess of the power of Congress."

But apart from the question of *bona fides*, this act cannot be brought within the power to regulate commerce among the several States, unless lottery tickets are articles of commerce, and, therefore, when carried across State lines, of interstate commerce; or unless the power to regulate interstate commerce includes the absolute and exclusive power to prohibit the transportation of anything or anybody from one State to another.

Mr. Justice Catron remarked in the *License Cases*, that "that which does not belong to commerce is within the police power of the State; and that which does belong to commerce is within the jurisdiction of the United States;" and the observation has since been repeatedly quoted by this court with approval.

In *United States* v. *E. C. Knight Company*, 156 U. S. 13, we said: "It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of Government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality. It will be perceived how far reaching the proposition is that the power of dealing with a monopoly directly may be exercised by the General Government whenever interstate or international commerce may be ultimately affected. The regulation of commerce applies to the subjects of commerce and not to matters of internal police." This case was adhered to in *Addystone Pipe and Steel Company* v. *United States*, 175 U. S. 211, where it was decided that Congress could prohibit the performance of contracts, whose natural effect, when carried out, would be to directly regulate interstate and foreign commerce.

It cannot be successfully contended that either Congress or the States can, by their own legislation, enlarge their powers, and the question of the extent and limit of the powers of either is a judicial question under the fundamental law.

If a particular article is not the subject of commerce, the determination of Congress that it is, cannot be so conclusive as to exclude judicial inquiry.

When Chief Justice Marshall said that commerce embraced intercourse, he added, commercial intercourse, and this was necessarily so since, as Chief Justice Taney pointed out, if intercourse were a word of larger meaning than the word commerce, it could not be substituted for the word of more limited meaning contained in the Constitution.

Is the carriage of lottery tickets from one State to another commercial intercourse?

The lottery ticket purports to create contractual relations and to furnish the means of enforcing a contract right.

This is true of insurance policies, and both are contingent in their nature. Yet this court has held that the issuing of fire, marine, and life insurance policies, in one State, and sending them to another, to be there delivered to the insured on payment of premium, is not interstate commerce. *Paul* v. *Virginia*, 8 Wall. 168; *Hooper* v. *California*, 155 U. S. 648; *New York Life Insurance Company* v. *Cravens*, 178 U. S. 389.

In *Paul* v. *Virginia*, Mr. Justice Field, in delivering the unanimous opinion of the court, said: "Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

This language was quoted with approval in *Hooper* v. *California*, 155 U. S. 648, and it was further said: "If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the States; and would exclude State control over many contracts purely domestic in their nature. The business of insurance is not commerce. A contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against 'the perils of the sea.'" Or, as remarked in *New York Life Insurance Company* v. *Cravens*, "against the uncertainty of man's mortality."

The fact that the agent of the foreign insurance company negotiated the contract of insurance in the State where the contract was to be finally completed and the policy delivered, did not affect the result. As Mr. Justice Bradley said in the leading case of *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489: "The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce." And see *Collins* v. *New Hampshire*, 171 U. S. 30, and other cases.

Tested by the same reasoning, negotiable instruments are not instruments of commerce; bills of lading are, because they stand for the articles included therein; hence it has been held that a State cannot tax interstate bills of lading because that would be a regulation of interstate commerce,

and that Congress cannot tax foreign bills of lading, because that would be to tax the articles exported, and in conflict with Article I, § 9, cl. 5, of the Constitution of the United States, that "No tax or duty shall be laid on articles exported from any State." *Fairbank* v. *United States*, 181 U. S. 283.

In *Nathan* v. *Louisiana*, 8 How. 73, it was held that a broker dealing in foreign bills of exchange was not engaged in commerce, but in supplying an instrumentality of commerce, and that a State tax on all money or exchange brokers was not void as to him as a regulation of commerce.

And in *Williams* v. *Fears*, 179 U. S. 270, that the levy of a tax by the State of Georgia on the occupation of a person engaged in hiring laborers to be employed beyond the limits of the State, was not a regulation of interstate commerce, and that the tax fell within the distinction between interstate commerce or an instrumentality thereof, and the mere incidents that might attend the carrying on of such commerce.

In *Cohens* v. *Virginia*, 6 Wheat. 264, 440, Congress had empowered the corporation of the city of Washington to "authorize the drawing of lotteries for any improvement of the city, which the ordinary funds or revenue thereof will not accomplish." The corporation had duly provided for such lottery, and this case was a conviction under a statute of Virginia for selling tickets issued by that lottery. That statute forbade the sale within the State of any ticket in a lottery not authorized by the laws of Virginia.

The court held, by Chief Justice Marshall, that the lottery was merely the emanation of a corporate power, and "that the mind of Congress was not directed to any provision for the sale of the tickets beyond the limits of the corporation."

The constitutionality of the act of Congress, as forcing the sale of tickets in Virginia, was therefore not passed on, but if lottery tickets had been deemed articles of commerce, the Virginia statute would have been invalid as a regulation of commerce, and the conviction could hardly have been affirmed, as it was.

In *Nutting* v. *Massachusetts*, 183 U. S. 553, 556, Mr. Justice Gray said: "A State has the undoubted power to prohibit foreign insurance companies from making contracts of insurance, marine or other, within its limits, except upon such conditions as the State may prescribe not interfering with interstate commerce. A contract of marine insurance is not an instrumentality of commerce, but a mere incident of commercial intercourse. The State, having the power to impose conditions on the transaction of business by foreign insurance companies within its limits, has the equal right to prohibit the transaction of such business by agents of such companies, or by insurance brokers, who are to some extent the representatives of both parties."

If a State should create a corporation to engage in the business of lotteries, could it enter another State, which prohibited lotteries, on the ground that lottery tickets were the subjects of commerce?

On the other hand, could Congress compel a State to admit lottery matter within it, contrary to its own laws?

In *Alexander* v. *Georgia*, 86 Ga. 246, it was held that a State statute prohibiting the business of buying and selling what are commonly known as "futures," was not protected by the commerce clause of the Constitution, as the business was gambling, and that clause protected interstate commerce but did not protect interstate gambling. The same view was expressed in *State* v. *Stripling*, 113 Ala. 120, in respect of an act forbidding the sale of pools on horse races conducted without the State.

In *Ballock* v. *Maryland*, 73 Md. 1, it was held that when the bonds of a foreign government are coupled with conditions and stipulations that change their character from an obligation for the payment of a certain sum of money to a species of lottery tickets condemned by the police regulations of the State, the prohibition of their sale did not violate treaty stipulation or constitutional provision. Such bonds with such conditions and stipulations ceased to be vendible under the law.

So lottery tickets forbidden to be issued or dealt in by the laws of Texas, the *terminus a quo*, and by the laws of California or Utah, the *terminus ad quem*, were not vendible; and for this reason also not articles of commerce.

If a lottery ticket is not an article of commerce, how can it become so when placed in an envelope or box or other covering, and transported by an express company? To say that the mere carrying of an article which is not an article of commerce in and of itself nevertheless becomes such the moment it is to be transported from one State to another, is to transform a non-commercial article into a commercial one simply because it is transported. I cannot conceive that any such result can properly follow.

It would be to say that everything is an article of commerce the moment it is taken to be transported from place to place, and of interstate commerce if from State to State.

An invitation to dine, or to take a drive, or a note of introduction, all become articles of commerce under the ruling in this case, by being deposited with an express company for transportation. This in effect breaks down all the differences between that which is, and that which is not, an article of commerce, and the necessary consequence is to take from the States all jurisdiction over the subject so far as interstate communication is concerned. It is a long step in the direction of wiping out all traces of State lines, and the creation of a centralized government.

Does the grant to Congress of the power to regulate interstate commerce impart the absolute power to prohibit it?

It was said in *Gibbons* v. *Ogden* that the right of intercourse between State and State was derived from "those laws whose authority is acknowl-

edged by civilized man throughout the world;" but under the Articles of Confederation the States might have interdicted interstate trade, yet when they surrendered the power to deal with commerce as between themselves to the General Government it was undoubtedly in order to form a more perfect union by freeing such commerce from State discrimination, and not to transfer the power of restriction.

"But if the power of regulation is absolutely unrestricted as respects interstate commerce, then the very unity the Constitution was framed to secure can be set at naught by a legislative body created by that instrument." 183 U. S. 171.

It will not do to say—a suggestion which has heretofore been made in this case—that State laws have been found to be ineffective for the suppression of lotteries, and therefore Congress should interfere. The scope of the commerce clause of the Constitution cannot be enlarged because of present views of public interest.

In countries whose fundamental law is flexible it may be that the homely maxim, "to ease the shoe where it pinches," may be applied, but under the Constitution of the United States it cannot be availed of to justify action by Congress or by the courts.

The Constitution gives no countenance to the theory that Congress is vested with the full powers of the British Parliament, and that, although subject to constitutional limitations, it is the sole judge of their extent and application; and the decisions of this court from the beginning have been to the contrary.

"To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" asked Marshall, in *Marbury* v. *Madison*.

"Should Congress," said the same great magistrate in *McCulloch* v. *Maryland*, "under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the Government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."

And so Chief Justice Taney, referring to the extent and limits of the powers of Congress: "As the Constitution itself does not draw the line, the question is necessarily one for judicial decision, and depending altogether upon the words of the Constitution."

It is argued that the power to regulate commerce among the several States is the same as the power to regulate commerce with foreign nations, and with the Indian tribes. But is its scope the same?

As in effect before observed, the power to regulate commerce with foreign nations and the power to regulate interstate commerce, are to be taken *diverso intuitu*, for the latter was intended to secure equality and freedom in commercial intercourse as between the States, not to permit the creation

of impediments to such intercourse; while the former clothed Congress with that power over international commerce, pertaining to a sovereign nation in its intercourse with foreign nations, and subject, generally speaking, to no implied or reserved power in the States. The laws which would be necessary and proper in the one case, would not be necessary or proper in the other.

Congress is forbidden to lay any tax or duty on articles exported from any State, and while that has been applied to exports to a foreign country, it seems to me that it was plainly intended to apply to interstate exportation as well; Congress is forbidden to give preference by any regulation of commerce or revenue to the ports of one State over those of another; and duties, imposts and excises must be uniform throughout the United States.

"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." This clause of the second section of Article IV was taken from the fourth article of Confederation, which provided that "the free inhabitants of each of these States . . . shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and egress to and from any other State, and shall enjoy therein all the privileges of trade and commerce;" while other parts of the same article were also brought forward in Article IV of the Constitution.

Mr. Justice Miller, in the *Slaughterhouse cases*, 16 Wall. 36, 75, says that there can be but little question that the purpose of the fourth article of the Confederation, and of this particular clause of the Constitution, "is the same, and that the privileges and immunities intended are the same in each."

Thus it is seen that the right of passage of persons and property from one State to another cannot be prohibited by Congress. But that does not challenge the legislative power of a sovereign nation to exclude foreign persons or commodities, or place an embargo, perhaps not permanent, upon foreign ships or manufactures.

The power to prohibit the transportation of diseased animals and infected goods over railroads or on steamboats is an entirely different thing, for they would be in themselves injurious to the transaction of interstate commerce, and, moreover, are essentially commercial in their nature. And the exclusion of diseased persons rests on different ground, for nobody would pretend that persons could be kept off the trains because they were going from one State to another to engage in the lottery business. However enticing that business may be, we do not understand these pieces of paper themselves can communicate bad principles by contact.

The same view must be taken as to commerce with Indian tribes. There is no reservation of police powers or any other to a foreign nation or to an

Indian tribe, and the scope of the power is not the same as that over interstate commerce.

In *United States* v. 43 *Gallons of Whiskey*, 93 U. S. 188, 194, Mr. Justice Davis said: "Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes,—a power as broad and free from restrictions as that to regulate commerce with foreign nations. The only efficient way of dealing with the Indian tribes was to place them under the protection of the general government. Their peculiar habits and character required this; and the history of the country shows the necessity of keeping them 'separate, subordinate, and dependent.' Accordingly, treaties have been made and laws passed separating Indian territory from that of the States, and providing that intercourse and trade with the Indians should be carried on solely under the authority of the United States."

I regard this decision as inconsistent with the views of the framers of the Constitution, and of Marshall, its great expounder. Our form of government may remain notwithstanding legislation or decision, but, as long ago observed, it is with governments, as with religions, the form may survive the substance of the faith.

In my opinion the act in question in the particular under consideration is invalid, and the judgments below ought to be reversed, and my brothers BREWER, SHIRAS and PECKHAM concur in this dissent.

True copy.

Test:

*Clerk Supreme Court, U. S.*

# Supreme Court of the United States.

No. 80.—October Term, 1902.

John Francis, Anthony Hoff, and John Edgar, alias Peter Edgar, Petitioners, *vs.* The United States. | On writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[February 23, 1903.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an indictment under Rev. Stat. § 5440, for conspiring to commit an offense against the United States. The offense which the defendants are alleged to have conspired to commit and to have committed is that of causing to be carried from one State to another, viz., from Kentucky to Ohio, five papers, certificates and instruments, purporting to be and to represent chances, shares and interests in the prizes thereafter to be awarded by lot in the drawings of a lottery, commonly known as the game of policy. Act of March 2, 1895, c. 191, 28 Stat. 963. It appears that the lottery in question had its headquarters in Ohio and agencies in different States. A purchaser, or person wishing to take a chance, went to one of these agencies, in this case in Kentucky, selected three or more numbers, wrote them on a slip, and handed the slip to the agent, in this case to the defendant Hoff, paying the price of the chance at the same time, and keeping a duplicate, which was the purchaser's voucher for his selection. The slip in this case was taken by the defendant Edgar to be carried to the principal office, where afterwards, in the regular course, there would be a drawing by the defendant Francis. If the purchaser's number should win, the prize would be sent to the agency and paid over. The carriage from one State to another, relied upon as the object of the conspiracy, and as the overt act in pursuance of the conspiracy, was the carriage by Edgar of slips delivered to Hoff, as above described. The case was sent to the jury by the District Court, the defendants were found guilty, and the judgment against them was affirmed by the Circuit Court of Appeals. *Reilley* v. *United States*, 106 Fed. Rep. 896. The case then was brought here on certiorari.

An exception was taken at every step of the trial in the hope that some shot might hit the mark. We entirely agree with the Circuit Court of Appeals in its unfavorable comments on the practice. But, little attention as most of the objections made deserve, they at least succeeded in raising the broad questions whether the act of 1895 is constitutional and

whether the offense proved is within it. The former is disposed of by the case of *Champion* v. *Ames*, decided this day. The latter remains, and thus far seems to us not to have received quite sufficient notice.

The game was played by mixing seventy-eight consecutive numbers and drawing out twelve after all the purchases for the game had been reported. If the three on any slip corresponded in number and order with three drawn out, the purchaser won. The purpose of bringing in the slips to headquarters was that all purchases should be known there before the drawing, and thus swindling by agents of the lottery made impossible. It is said by the Circuit Court of Appeals that the successful slips were returned with the prizes. If this is correct we do not perceive that it materially affects the case. The arrangement, whatever it was, was for the convenience and safety of those who managed this lottery, and was in no way essential to the interests of the person making the purchase or bet. The daily report of the result of the drawings to Hoff, with whom he dealt, and the forwarding of the prize, if drawn, filled all his needs. It would seem from the evidence, as the government contended—certainly the contrary does not appear and was not argued—that Hoff and Edgar, the carrier, were agents of the lottery company. Thus the slips were at home, as between the purchaser and the lottery, when put into Hoff's hands. They had reached their final destination in point of law, and their later movements were internal circulation within the sphere of the lottery company's possession. Therefore the question is suggested whether the carriage of a paper of any sort by its owner or the owner's servant, properly so called, with no view of a later change of possession, can be commerce, even when the carriage is in aid of some business or traffic. The case is different from one where, the carriage being done by an independent carrier, it is commerce merely by reason of the business of carriage.

The question just put need not be answered in this case. For on another ground we are of opinion that there was no evidence of an offense within the meaning of the act of 1895. The assumption has been that the slips carried from Kentucky to Ohio were papers purporting to be or represent a ticket or interest in a lottery. But in our opinion these papers did not purport to be or do either. A ticket, of course, is a thing which is the holder's means of making good his rights. The essence of it is that it is in the hands of the other party to the contract with the lottery as a document of title. It seems to us quite plain that the alternative instrument mentioned by the statute, viz., a paper representing an interest in a lottery, equally is a document of title to the purchaser and holder—the thing by holding which he makes good his right to a chance in the game. But the slips transported, as we have pointed out, were not the purchasers' documents. It is true that they corresponded in contents, and so in one sense represented or depicted the purchasers' interests.

But "represent" in the statute means, as we already have said in other words, represent to the purchaser. It means stand as the representative of title to the indicated thing—and that these slips did not do. The function of the slips might have been performed by descriptions in a book, or by memory, if the whole lottery business had been done by one man. They as little represented the purchasers' chances, as the stubs in a check book represent the sums coming to the payees of the checks.

We assume for purposes of decision that the papers kept by the purchasers were tickets or did represent an interest in a lottery. But those papers did not leave Kentucky. There was no conspiracy that they should. We need not consider whether, if it had been necessary to take them to Ohio in order to secure the purchasers' rights, the lottery keepers could be said to conspire to cause them to be carried there, when the carriage would be in an interest adverse to theirs, and they would be better off and presumably glad if the papers never were presented. See *Commonwealth* v. *Peaslee*, 177 Mass. 267, 271; *Graves* v. *Johnson*, 179 Mass. 53, 58.

*The judgment of the Circuit Court of Appeals is reversed; the judgment of the District Court is also reversed and the cause remanded to that court with directions to set aside the verdict and grant a new trial.*

True copy.

Test:

*Clerk Supreme Court, U. S.*

# Supreme Court of the United States.

No. 80.—October Term, 1902.

John Francis, Anthony Hoff, and John Edgar, alias Peter Edgar, Petitioners, *vs.* The United States. | On writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[February 23d 1903.]

Mr. Justice Harlan dissenting.

This is a criminal prosecution based upon the first section of the act of Congress of March 2d 1895, *c.* 191, entitled "An act for the suppression of lottery traffic through national and interstate commerce and the postal service, subject to the jurisdiction and laws of the United States."

That section reads: "§ 1. That any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, *or* deposited in or carried by the mails of the United States, *or* carried from one State to another in the United States, any paper, certificate or instrument purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, *or* shall cause any advertisement of such lottery, so called gift concert, or similar enterprises, offering prizes dependent upon lot or chance, to be brought into the United States, *or* deposited in or carried by the mails of the United States, *or* transferred from one State to another in the same, shall be punishable in the first offense by imprisonment for not more than two years or by a fine of not more than one thousand dollars, or both, and in the second and after offenses by such imprisonment only." 28 *Stat.* 963.

The indictment charges a conspiracy to commit the offense denounced by that section.

Judge Severens, delivering the judgment of the Circuit Court of Appeals, thus stated, and I think accurately, the result of certain evidence on the part of the Government: "Upon the trial the Government offered evidence tending to prove that the respondents offered a scheme of lottery business called by them 'policy,' which they subsequently carried into operation, of the character following: The principal office for the transaction of the business was located in a building in Cincinnati, Ohio. The place where the drawings of numbers from a wheel were made was located in another building or room

adjoining the principal office and connected with it by a private way. In various places in that city and elsewhere, in Ohio and other States, one, at least, being in Newport, Kentucky, they had offices or stations at which the patrons purchased tickets or chances in the drawings to be thereafter made in Cincinnati, at the place mentioned. Successive numbers from one to seventy-eight, inclusive, were each day put into the wheel, and at each drawing twelve numbers were taken out. A list of these twelve numbers was taken into the principal office and there recorded. Several hours in the day before these drawings respectively took place the patrons purchased chances at the sub-offices or stations from an agent of the respondents, or from one of the latter, in charge at that place. In this instance the purchase was made of the respondent Hoff at the Newport office. The purchaser (Harrison, in this instance) chose three of the numbers from one to seventy-eight, inclusive, and wrote them upon a slip of paper, of which, according to the method of doing business, he kept a duplicate. He handed his list of numbers, with figures to denote the sum paid, upon a slip of paper, and the money to pay for his chance, to the person in charge to be transmitted to the principal office in Cincinnati, by the 'carrier,' who would call to take them up. When these slips and the moneys were all brought into the principal office, the drawing above mentioned took place. If the three numbers on the slip were of the twelve drawn from the wheel, the purchaser would win the prize, $200, when the game (of which there were several forms) was played on the basis above stated. If not, he lost. A report of the drawings was sent back to the station from which the slip came, and if any purchaser had made a 'hit' his slip would be returned with the prize to be there delivered to him. Of the respondents, Reilley was in charge of the principal office, Francis of the drawings, Hoff of the station in Newport, as already stated, and Edgar was the carrier. The slip of paper taken by the carrier represented the interest of the purchaser of the chance, and, although containing figures only, it had a definite meaning and was understood by all the parties concerned. It was the transportation of some of such lists, one being that of Harrison, from Newport, Kentucky, to Cincinnati, Ohio, with knowledge of their character that constituted the overt act done in pursuance of the conspiracy." That the counsel for the accused held the same view of the evidence is shown in an extract from their brief printed in the margin.*

* "In the *Francis case*, now before the court, it was shown that the principal office of the 'policy' concern was located in Cincinnati, Ohio, that the drawings took place in an adjoining building or room, and that sub-offices or agencies were maintained in various places in that city and in other cities in Ohio and other States, at which patrons or players would select numbers in the drawings to be made in Cincinnati. One desiring to play such a game would choose three of the numbers from 1 to 78 inclusive, and write them upon a slip of paper, of which he

I. The act of March 2d 1895, c. 191, was under examination by this court in *France* v. *United States*, 164 *U. S.* 676. That was an indictment for a conspiracy to violate its first section. The judgment of conviction in that case was reversed upon the ground that the evidence showed that the papers and instruments which the defendants caused to be carried from Kentucky to Ohio did not relate to a lottery to be thereafter drawn, but to one that had previously been drawn. The court said: "There is no contradiction in the testimony, and the Government admits and assumes that the drawings in regard to which these papers contained any information had already taken place in Kentucky, and it was the result of that drawing only that was on its way in the hands of messengers to the agents of the lottery in Cincinnati. The statute does not cover the transaction, and however reprehensible the acts of the plaintiffs in error may be thought to be, we cannot sustain a conviction on that ground. Although the objection is a narrow one, yet the statute being highly penal, rendering its violator liable to fine and imprisonment, we are compelled to construe it strictly. Full effect is given to the statute by holding that the language applies only to that kind of a paper which depends upon a lottery the drawing of which has not yet taken place, and which paper purports to be a certificate, &c., as described in the act. If it be urged that the act of these plaintiffs in error is within the reason of the statute, the answer must be that it is so far outside of its language that to include it within the statute would be to legislate and not to construe legislation."

No such point can be made in this case, because the indictment presents a case within the provisions of the statute as interpreted in *France* v. *United States;* for it refers to papers and instruments relating to a lottery thereafter to be drawn. Besides, there was evidence tending to show that the papers and instruments which the defendants were charged to have caused

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kept a duplicate. He would hand his list of numbers, with figures to denote the sum paid, together with the money to pay for his chance, to the person in charge of the sub-office or agency to be transmitted to the principal office in Cincinnati. When these slips and the moneys were brought to the principal office, the drawing took place. Successive numbers from 1 to 78 inclusive were put into a wheel, and at each drawing twelve numbers were taken out. If the three numbers on the slip were of the twelve drawn from the wheel, the purchaser would win a prize. If not, he lost. A report of the drawings was sent back to the agency from which the slip came, and, if any purchaser had won a prize or, as it is termed, made a 'hit,' his slip was returned with the prize to be there delivered to him. In the instance shown by the testimony, the selection was made by the witness Harrison at the Newport office. The defendant Reilley was claimed to be in charge of the principal office in Cincinnati, Francis in charge of the drawings, and Hoff in charge of the station in Newport. Edgar carried the slips from Newport to Cincinnati, and this carriage of the slips constituted the alleged overt act done in pursuance of a conspiracy in violation of the act of Congress."

to be carried from Kentucky to Ohio had reference to a future drawing and not to one that had already occurred. And the trial judge, after stating the facts, said to the jury: "Did these papers, or so-called lottery tickets, which it is alleged defendants conspired to carry from Kentucky to Ohio, purport to represent interests of players in a drawing afterwards to take place? It is not necessary, gentlemen, that they should purport or show upon their face that they were tickets in a lottery giving an interest to the holder, in a drawing afterwards to take place, but their purport may be shown outside of the papers. Now, as to the evidence offered by the Government upon that point, you will recall the evidence of France, who was introduced as an expert, to tell what they were, and the evidence of Harrison, that he wrote out his ticket and delivered one-half of it to the agent, paid his money and held the duplicate—one of the duplicates, his evidence of the interest he had in the drawing that was to come off that day, and the evidence to which I have before referred as to the fact that the duplicate left with Hoff was afterwards found in possession of Edgar at the end of the bridge shortly after the play was made. If, from these facts you are satisfied that it represented an interest in the drawings afterwards to take place then, within the meaning of the law, it purported to represent the interest of the player in the drawing, although it did not so state upon its face."

II. In *Champion* v. *Ames*, this day decided, it has been held that lottery tickets were subjects of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one State to another was therefore interstate commerce; that under its power to regulate commerce among the several States, Congress—subject to the limitations imposed by the Constitution upon the powers granted by it—has plenary authority over such commerce, and may prohibit the carriage of such tickets from State to State; and that legislation to that end and of that character is not inconsistent with any limitation or restriction imposed by the Constitution upon the exercise of the powers granted to Congress.

Here, there was no carrying of lottery tickets from Kentucky to Ohio by an independent carrier engaged in the transportation, for hire, of freight and packages from one State to another. But the carrying was by an individual acting in pursuance of a conspiracy between himself and others that had for its object the carrying from Kentucky to Ohio of certain papers or instruments representing a chance, share or interest in or dependent upon the event of a lottery, thereafter to be drawn, which offered prizes dependent upon lot or chance. Those who were parties to the conspiracy were, in effect, partners in committing the crime denounced by the above act of Congress; and the act of one of the parties in execution of the objects of such conspiracy was the act of all the conspirators.

The judgment therefore should be affirmed, unless it be that the carrying of lottery tickets from one State to another by an individual, acting

in co-operation with his co-conspirators, is not interstate "commerce." But is it true that the "commerce among the several States," which Congress has the power to regulate, cannot be carried on by an individual, or by a combination of individuals? We think not. In *Paul* v. *Virginia*, 8 *Wall.* 168, 183, the court, referring to the grant to Congress of power to regulate commerce among the several States, said: "The language of the grant makes no reference to the instrumentalities by which commerce may be carried on; it is general and includes alike commerce by individuals, partnerships, associations and corporations." In *Welton* v. *State of Missouri*, 91 *U. S.* 275, 280, it was said that the power to regulate commerce embraces "all the instruments by which such commerce may be conducted." That the commerce clause of the Constitution embraces alike commerce by individuals, partnerships, associations and corporations was recognized in *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 *U. S.* 1, 21. And in *Gloucester Ferry Co.* v. *Pennsylvania*, 114 *U. S.* 196, 205, the court said that commerce among the States "includes commerce by whomsoever conducted, whether by individuals or by corporations."

In *Champion* v. *Ames* the carrying of lottery tickets happened to be by an incorporated express company. But if it had been by an express company organized as a partnership or joint stock company the result of the decision could not have been different. In this case, if the carrying had been by an ordinary express wagon, owned by a private person, but employed by the accused and other conspirators to carry the lottery papers in question from Kentucky to Ohio, surely the carrying in that mode would be commerce within the meaning of the Constitution. It cannot be any less commerce because the carrying was by an individual who, in conspiracy or co-operation with others, caused the carrying to be done in violation of the act of Congress. The learned counsel for the accused, referring to the legislation enacted prior to 1895, which had for its object to exclude lottery matter from the mails, and to prohibit the importation of lottery matter from abroad, says: "In 1895 the act now in question was passed, supplementing the provisions of the prior acts so as to prohibit the act of causing lottery tickets to be carried and lottery advertisements to be transferred from one State to another by *any means or methods.*"

It seems to me that the evidence made a case within the act of Congress, and that no error of law was committed by the trial court. The papers carried from Kentucky to Ohio were of the class described in the act, "any paper, certificate or instrument purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance." The paper or instrument carried from Kentucky to Ohio, of which the purchaser had a duplicate, certainly represented, to all the

parties concerned, a chance, or interest dependent upon an event of a lottery or "similar enterprise," offering prizes dependent upon a lot or chance. To hold otherwise is to stick in the bark. It informed the policy gambler, if a prize was drawn, that the person who held the duplicate was entitled to the prize, and it was therefore a paper the carrying of which from one State to another made the conspirators causing it to be so carried, guilty of an offense under the act of Congress. The reasoning by which the case is held not to be embraced by the act of Congress is too astute and technical to commend itself to my judgment. It excludes from the operation of the act a case which, as I think, is clearly within its provisions.

True copy.

Test:

*Clerk Supreme Court, U. S.*